IN THE TEXAS COURT OF APPEALS
FOR THE FIFTH DISTRICT AT DALLAS

THE STATE OF TEXAS,	§	**No. 05-13-00421-CR**
Appellant,	§	
	§	**No. 05-13-00423-CR**
v.	§	
	§	**No. 05-13-00424-CR**
ALBERT G. HILL III,	§	
Appellee.	§	**No. 05-13-00425-CR**

On Appeal from the 204th Judicial District Court of Dallas County, Texas
Cause Nos. F11-00180, F11-00182, F11-00183, and F11-00191

STATE'S OPENING BRIEF AND APPENDIX

Charles "Chad" Baruch
Texas Bar No. 01864300
Special Prosecutor
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028

Craig Watkins
Texas Bar No. 00791886
CRIMINAL DISTRICT ATTORNEY
Dallas County, Texas

Michael R. Casillas
Texas Bar No. 03967500
Assistant District Attorney
Chief Prosecutor – Appellate Division
Frank Crowley Courts Building
133 North Riverfront Blvd., LB 19
Dallas, Texas 75207-4399
Telephone: (214) 653-3600
Facsimile: (214) 653-5774

Counsel for the State of Texas

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Appellant tenders this list of all parties and counsel to the trial court's judgment to assist this court in determining qualification and recusal under Rule 38 of the Texas Rules of Appellate Procedure:

Appellant The State of Texas

Counsel in the Court of Appeals:
Charles "Chad" Baruch
Special Prosecutor
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088

Counsel in the Trial Court and the Court of Appeals:
Craig Watkins
CRIMINAL DISTRICT ATTORNEY
Dallas County, Texas

Michael R. Casillas
Assistant District Attorney
Chief Prosecutor – Appellate Division
Frank Crowley Courts Building
133 North Riverfront Blvd., LB-19
Dallas, Texas 75207-4399

Counsel in the Trial Court:
Russell Wilson II
Lisa B. Smith
Assistant District Attorneys
Frank Crowley Courts Building
133 North Riverfront Blvd., LB-19
Dallas, Texas 75207-4399

Former Counsel in the Trial Court:
Donna Strittmatter
Stephanie Martin
Deborah Smith
Assistant District Attorneys
Frank Crowley Courts Building
133 North Riverfront Blvd., LB-19
Dallas, Texas 75207-4399

Appellee Albert G. Hill III

Counsel in the Court of Appeals:
Michael Mowla
603 North Cedar Ridge, Suite 100
Duncanville, Texas 75116

Counsel in the Trial Court:
John C. Hueston
Marshall A. Camp
Alison L. Plessman
IRELL & MANELLA, LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067

George R. Milner III
MILNER FINN PRICE
2828 North Harwood Street, Suite 1950
Dallas, Texas 75201

Royce West
WEST & ASSOCIATES, LLP
320 South R.L. Thornton Freeway, Suite 300
Dallas, Texas 75203

Anthony D. Lyons
LAW OFFICE OF ANTHONY LYONS
320 South R.L. Thornton Freeway, Suite 300
Dallas, Texas 75203

Trial Court Judge:

Hon. Lena Levario
204th Judicial District Court, Dallas County, Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT OF THE CASE

A Dallas County grand jury indicted Albert G. Hill III on multiple counts of mortgage fraud.[1] Mr. Hill filed a motion alleging prosecutorial misconduct and seeking dismissal of the indictments.[2] During an evidentiary hearing on that motion, Dallas County District Attorney Craig Watkins refused to testify based on his assertion of privilege. Concluding that this refusal denied Mr. Hill "his right to have a meaningful hearing" on his motion,[3] the trial court dismissed the indictments with prejudice.[4] The State timely filed notice of this appeal.[5]

STATEMENT REGARDING ORAL ARGUMENT

The State believes oral argument would assist this court in understanding the legal issues implicated by Mr. Hill's constitutional claims under the federal equal protection and due process clauses, as well as the propriety of the trial court's order dismissing the indictments with prejudice.

---

[1] CR-180-I at 6; CR-181-I at 5-6; CR-182-I at 6; CR-183-I at 6; CR-191-I at 5. Citations to the clerk's record are to the appeal number, volume number, and page number.

[2] CR-180-I at 31-67; CR-181-I at 30-66; CR-182-I at 27-63; CR-182-I at 27-63; CR-191-I at 26-62.

[3] CR-180-S at 115; CR-182-S at 115; CR-183-S at 114; CR-191- S at 100.

[4] App. 1; CR-180-III at 1100; CR-182-III at 978; CR-183-III at 977; CR-191-II at 577.

[5] The indictment in Cause No. F11-00181 went missing after return by the grand jury. A different grand jury issued the reindicted charge in Cause No. F11-00191 in April 2011. CR-181-I at 5-6; CR-191-I at 5-6; 4 R.R. at 168-69. The original indictment in Cause No. F11-00181 was dismissed after reindictment. As a result, the State had filed a motion to dismiss Appeal No. 05-13-00422-CR, pertaining to Cause No. F11-00181.

STATEMENT OF ISSUES

1. Whether the trial court abused its discretion by granting Mr. Hill an evidentiary hearing—and then dismissing the indictments—even though he tendered no evidence to support that request.

2. Whether the trial court abused its discretion by granting Mr. Hill an evidentiary hearing—and then dismissing the indictments—where the facts he alleged failed to establish any constitutional violation.

3. Whether the trial court abused its discretion by compelling testimony from the District Attorney and then dismissing the indictments based on his refusal to testify.

4. Whether the trial court abused its discretion by dismissing the indictments against Mr. Hill with prejudice where dismissal without prejudice would have cured the claimed constitutional violations.

STATEMENT OF FACTS

1. After settling family trust litigation, Mr. Hill is sued by his former lawyers and indicted for mortgage fraud.

Albert G. Hill III is the great-grandson of deceased oil magnate H.L. Hunt. In 2007, Mr. Hill became embroiled in federal litigation with family

members—including his father, Albert G. Hill Jr.—over assets including a sizeable trust.[6]

The federal court in the trust litigation sanctioned Mr. Hill's father for perjury.[7] Shortly thereafter, Mike Lynn—an attorney for Mr. Hill's father—sent a package to the Dallas County District Attorney's Office alleging mortgage fraud by Mr. Hill and his wife, Erin.[8]

Mr. Lynn provided the DA's Office with documents suggesting that the Hills made false statements to procure a $500,000 loan.[9] The Hills signed documents claiming sole ownership of a $2.8 million house they pledged as collateral for the loan when apparently they owned only a 20% interest in that house.[10] The DA's Office subsequently received another complaint against Mr. Hill, this time from the trustee of the trust owning an

[6] CR-180-I at 36; CR-181-I at 35; CR-182-I at 32; CR-183-I at 32; CR-191-I at 31.
[7] The trial court made factual findings that the federal court also found that Mr. Hill's attorney, Mike Lynn, had "far exceeded the bounds of advocacy, permissible or otherwise." App. 2 at 1; CR-180-S at 79; CR-182-S at 79; CR-183-S at 78; CR-191-S at 64; 5 R.R., Def. Exh. 1, DF-PT-3, at 1-38. In fact, the federal court order says that "Al Jr.'s representations far exceeded the bounds of advocacy, permissible or otherwise." 5 R.R., Def. Exh. 1, DF-PT-3, at 31. This statement, then, was made in reference to Al Hill Jr., not his lawyer. The trial court's finding of fact is unsupported by the federal order—as was Mr. Hill's characterization of it.
[8] CR-180-I at 714-74; CR-181-I at 623-83; CR-182-I at 622-82; CR-183-I at 621-81 4 R.R. at 44-45, 76-77, 137-38.
[9] 5 R.R., St. Exh. 1, at 1; 4 R.R. at 44-45, 76-77, 137-38.
[10] 5 R.R., St. Exh. 1, at 1, C, D.

80% interest in the same house.[11] The DA's Office initiated an investigation of the matter.[12]

Meanwhile, Mr. Hill hired a team of prominent Dallas lawyers to represent him in the federal trust lawsuit on a contingent fee basis. Those lawyers—Lisa Blue, Charla Aldous, and Steve Malouf—represented Mr. Hill until he settled the case.[13] A fee dispute then arose and the lawyers sued Mr. Hill in federal court to collect their fees.[14]

Shortly before trial of the attorney's fee lawsuit, the DA's Office presented the criminal case against Mr. Hill and his wife to a grand jury, which issued multiple indictments for mortgage fraud on March 31, 2011.[15] Mr. Hill then asserted his Fifth Amendment privilege during the attorney's fee trial.[16] In January 2012, the federal court entered judgment against Mr. Hill awarding his former attorneys more than $20 million.[17]

---

[11] 4 R.R. at 77-79, 138-40.
[12] CR-S-I at 1-33; 4 R.R. at 140, 148-49. The appellate record also contains two sealed volumes designated in this brief as S-I and S-II. Any reference to documents in the sealed volumes is in the most general terms to avoid any breach of grand jury confidentiality.
[13] CR-180-I at 608-851; CR-181-I at 517-760; CR-182-I at 516-759: CR-183-I at 515-758.
[14] 5 R.R., Def. Exh. 1, DF-PT-9, at 1, 38-40.
[15] CR-180-I at 6-7; CR-181-I at 5-6; CR-182-I at 6-7; CR-183-I at 6-7; CR-191-I at 5; 4 R.R. at 167-69.
[16] CR-180-II at 1045-57; CR-181-II at 929-41; CR-182-II at 934-46; CR-183-II at 933-45.
[17] CR-180-I at 138-148; *see also Blue v. Hill*, Case No. 3:10-CV-02269-O-BK, Docket Nos. 379, 384 (available on PACER); CR-180-I at 33.

2. Mr. Hill alleges prosecutorial misconduct in an effort to avoid paying the $20 million judgment or facing a criminal trial.

In November 2012—while still challenging the $20 million federal judgment—Mr. Hill filed unsworn motions in his criminal cases seeking dismissal of the indictments or alternately an "evidentiary hearing and discovery into the issues surrounding the District Attorney's decision to indict this case."[18]

In his motions, Mr. Hill alleged that the DA's Office: (1) selectively prosecuted him in violation of his right to equal protection, (2) vindictively prosecuted him in violation of his right to due process, and (3) violated his right to due process by prosecuting him despite a financial conflict of interest arising from campaign contributions by Ms. Blue to District Attorney Craig Watkins. Mr. Hill also claimed that the DA's Office failed to follow its purported policy of permitting a criminal defendant's attorney to address the grand jury.[19]

Mr. Hill tendered no evidence in support of his unsworn motions; he simply attached documents to them.[20] Mr. Hill attached 44 exhibits including letters, pleadings, campaign contribution filing forms, website

[18] CR-180-I at 66; CR-182-I at 62; CR-183-I at 62; CR-191-I at 61. By this time, the DA's Office had dismissed all charges against Erin Hill.
[19] CR-180-I at 31-67; CR-182-I at 27-63; CR-183-I at 27-63; CR-191-I at 26-62.
[20] CR-180-I at 31-488; CR-182-I at 27-484; CR-183-I at 27-484; CR-191-I at 26-483.

printouts, telephone records, and other documents—not one of them authenticated.[21] Mr. Hill did not tender any affidavit testimony in support of his motion.[22] Mr. Hill did include excerpts from a few depositions and hearing transcripts. But these exceedingly short excerpts—with two exceptions to be discussed momentarily—had little to do with Mr. Hill's constitutional claims.

A month later, Mr. Hill filed a post-judgment motion in the federal lawsuit making the same allegations and asking that the court vacate the judgment against him based on the purported conspiracy between Ms. Blue and DA Watkins to use criminal indictments to affect the outcome of the federal fee trial.[23]

In his state and federal motions, Mr. Hill alleged that DA Watkins functioned as Ms. Blue's "stalking horse" in seeking indictments. Ms. Blue has represented DA Watkins (this representation was the subject of one of the deposition excerpts attached to Mr. Hill's motion[24]), made political contributions to him since at least 2007, and funded a $100,000 SMU

[21] CR-180-I at 68-488; CR-182-I at 64-484; CR-183-I at 64-484; CR-191-I at 63-483.
[22] CR-180-I at 31-488; CR-182-I at 27-484; CR-183-I at 27-484; CR-191-I at 26-483.
[23] *Blue v. Hill*, Case No. 3:10-CV-02269-O-BK, Docket No. 470 (available on PACER).
[24] CR-180-I at 175-183; CR-182-I at 171-79; CR-183-I at 171-79; CR-191-I at 170-78.

scholarship in his name.[25] During the period leading to the indictments, Ms. Blue contributed $7,500 to DA Watkins—out of total contributions exceeding $120,000.[26] Of course, Ms. Blue also contributed during that period to the campaigns of numerous other Dallas County office holders—including $2,000 contributions to at least four members of this court and $10,000 in contributions to one of Mr. Hill's lawyers in this case.[27]

Mr. Hill attached records showing that telephone and text message communications between Ms. Blue and DA Watkins spiked in the weeks leading to the indictments.[28] But Ms. Blue hosted a political fundraiser for DA Watkins during that same period.[29] And Mr. Hill produced no evidence that Ms. Blue and Mr. Watkins ever engaged in any substantive discussion of his case. Indeed, the federal judge presiding over the attorney's fee lawsuit reviewed the text messages between Ms. Blue and DA Watkins *in camera*—finding ***no mention*** of the Hill indictments.[30] Ms. Blue testified that she had two telephone conversations with DA Watkins about the indictments, each

[25] CR-180-I at 39; CR-182-I at 35; CR-183-I at 35; CR-191-I at 34.
[26] CR-180-I at 106-13; CR-182-I at 102-09; CR-183-I at 102-09; CR-191-I at 101-08.
[27] CR-180-I at 850; CR-182-I at 758; CR-183-I at 757.
[28] CR-180-I at 40-43, 212-408; CR-182-I at 36-40, 208-404; CR-183-I at 36-40, 208-404; CR-191-I at 35-38, 207-403.
[29] CR-180-II at 1052; CR-182-II at 941; CR-183-II at 940.
[30] CR-180-II at 1051; CR-182-II at 940; CR-183-II at 939.

lasting less than a minute and neither involving substantive discussion (this also was the subject of a deposition excerpt attached to Mr. Hill's motion).[31]

3. A federal magistrate judge reviews Mr. Hill's allegations and deems them "supposition and speculation."

A federal magistrate judge denied Mr. Hill's request for post-judgment relief, concluding that his accusations against Ms. Blue and DA Watkins "amount[ed] to nothing more than supposition and speculation."[32]

In considering Mr. Hill's allegations about campaign contributions, the magistrate judge noted that "Blue and D.A. Watkins have had a personal, professional, and financial relationship since at least 2007, well before [the lawyers were] involved in the Hills' case . . . [and] Blue's longstanding relationship with D.A. Watkins actually undermines their suggestion that she behaved unusually by communicating with Watkins around the time of the indictments and holding a fundraiser for him. Given Blue's and D.A. Watkins's long relationship and her previous donations to his campaigns, neither of these undertakings appears unusual."[33]

In addressing Mr. Hill's claims about the spike in text messages, the magistrate judge noted that "Judge [Reid] O'Connor reviewed Blue's text

[31] CR-180-I at 198-201; CR-181-I at 197-200; CR-182-I at 196-99; CR-183-1 at 194-96; CR-191-I at 193-96.
[32] CR-180-II at 1050; CR-182-I at 939; CR-183-I at 938.
[33] CR-180-II at 1051; CR-182-II at 940; CR-183-II at 939.

messages to and from D.A. Watkins during the timeframe in question. That discovery yielded no evidence that Blue and D.A. Watkins ever discussed the Hills' indictments outside of the two brief instances when D.A. Watkins called Blue prior to the return of the indictments—instances about which Blue previously had testified and of which the Hills have long since been aware."[34] In short, according to the magistrate judge:

> The Hills simply do not demonstrate by clear and convincing evidence that [the lawyers were] involved in the Hills' indictment.[35]

4. Relying on the same allegations rejected by the federal court, the trial court conducts an evidentiary hearing and dismisses the indictments.

The State filed a response to Mr. Hill's motion in the criminal case and tendered supporting affidavits from Donna Strittmatter and Stephanie Martin, two of the assistant district attorneys involved in prosecuting Mr. Hill. Both prosecutors testified that the DA's Office had no policy requiring that the target of a criminal investigation be permitted to address the grand jury.[36] They also denied knowing about Mr. Hill's dispute with Ms. Blue.[37]

[34] CR-180-II at 1051; CR-182-II at 940; CR-183-II at 939.
[35] CR-180-II at 1052; CR-182-II at 941; CR-183-II at 940.
[36] CR-180-I at 774, 778; CR-182-I at 682, 686; CR-183-I at 681, 685.
[37] CR-180-I at 774, 778; CR-182-I at 682, 686; CR-183-I at 681, 685.

Finally, Ms. Martin testified that the prosecution of Mr. Hill was not unusual:

> The Specialized Division regularly prosecutes crimes similar to those committed by Mr. Hill . . . Prior to Mr. Hill's indictment, I personally and successfully prosecuted four other mortgage fraud cases where no money was funded and, thus, no actual loss was suffered.[38]

The trial court scheduled a hearing on Mr. Hill's motion to dismiss. In anticipation of that hearing, Mr. Hill served subpoenas on DA Watkins, Ms. Strittmatter, Ms. Martin, former First Assistant DA Terri Moore, and a former administrative assistant seeking to compel their testimony and production of various documents. The subpoena to DA Watkins sought production of "all communications" and "all documents" between DA Watkins and anyone else concerning the Hill investigation and prosecution.[39] The recipients filed motions to quash the subpoenas.[40]

On February 14, 2013, the trial court conducted a hearing on Mr. Hill's motion. No one introduced any evidence at the hearing. Mr. Hill's lawyers argued that he was entitled to an evidentiary hearing and, ultimately, dismissal based on his three constitutional claims. But they also admitted

[38] CR-180-I at 778; CR-182-I at 686; CR-183-I at 685.
[39] CR-180-I at 523-67.
[40] CR-180-I at 506-47.

that they required the evidentiary hearing to ***develop*** evidence of these alleged violations:

> THE COURT: So my question is: What kind of evidence do you expect to present to convince the Court that he doesn't present – that he doesn't prosecute these types of cases . . . ?
>
> MR. HUESTON: Well let me explain one – Your Honor, this is – it kinda proceeds in buckets. Bucket number one is, there was a corrupt deal that caused this case to be indicted. That's gonna ***come out in the examinations*** of Mr. Watkins and Ms. Blue . . . Number two, ***we're gonna show that***, even independent of a corrupt deal – let's put that aside. And we're ***going to elicit that*** – that this case has all the hallmarks of a case that would normally be declined by this office. That is selective prosecution.[41]
>
> . . .
>
> THE COURT: But what evidence was presented to convince the Court that this type of case would not normally have been indicted?
>
> MS. PLESSMAN: This –
>
> THE COURT: And are you prepared to present such evidence today?
>
> MS. PLESSMAN: I – I think we are prepared to ***present such evidence today.***[42]
>
> . . .

[41] 2 R.R. at 15-16 (emphasis added).
[42] 2 R.R. at 13-14 (emphasis added).

> MR. HUESTON: . . . These circumstances, in part and through the testimony, I think, ***we will elicit***, will show that he has been vindictively and selectively prosecuted.[43]

The State argued that Mr. Hill's failure to provide any evidence to establish a prima facie case of a constitutional violation precluded an evidentiary hearing.[44] The trial court overruled the State's objections to the subpoenas,[45] scheduled an evidentiary hearing,[46] and ordered DA Watkins to appear and testify.[47] But even the trial court acknowledged the lack of evidence at that time to support Mr. Hill's allegations, telling his lawyers "your exhibits on your motions are not evidence"[48] and saying:

> THE COURT: . . . So is that the type of evidence that you're gonna be presenting to the Court. I mean, ***I don't understand how you're going to get there*** . . . .[49]
>
> . . .
>
> THE COURT: Yes. I am granting the Defendant the right to have ***a hearing to try to prove*** to the Court that this case was handled differently from any other case that would come before the . . . DA.[50]

---

[43] 2 R.R. at 16 (emphasis added).
[44] 2 R.R.at 31.
[45] 2 R.R. at 53.
[46] 2 R.R. at 30.
[47] 2 R.R. at 54.
[48] 3 R.R. at 23-24.
[49] 2 R.R. at 17 (emphasis added).
[50] 2 R.R. at 30-31 (emphasis added).

On March 4, 2013, the trial court convened the evidentiary hearing but then rescheduled it for the following week. By this time, DA Watkins had sought mandamus relief from this court and the Texas Court of Criminal Appeals.[51]

On March 7, 2013—with the mandamus petitions having been denied—the trial court conducted its evidentiary hearing. The State asked to present evidence concerning its privilege claims but the trial court refused this request.[52] Mr. Hill's lawyers called DA Watkins as a witness and asked him the following two questions:

> Q: Mr. Watkins, before the indictments of the Hills were handed down, you had at least one or more phone calls with Lisa Blue concerning the Hills, correct?
>
> Q: You said to Ms. Blue, words to the effect of, There could be an indictments of Mr. Hill, or both the Hills. Are you still interested in the indictments? Correct, sir?

DA Watkins refused to answer, asserting the attorney-client privilege and work product exemption. The trial court held him in contempt of court.[53]

---

[51] CR-180-III at 1163-1213; CR-182-III at 1042-92; CR-183-III at 1041-91; CR-191-II at 599-649.
[52] 4 R.R.at 8.
[53] 4 R.R. at 17.

The trial court then conducted a lengthy evidentiary hearing during which Ms. Moore testified that DA Watkins attended a "pitch session" on the Hill indictments.[54] This, she testified, was not unusual; DA Watkins often attends pitch sessions.[55] Ms. Moore testified that she had no knowledge of DA Watkins ever discussing the Hill case with Ms. Blue.[56] And she denied the existence of any grand jury notice policy—a notion she deemed "laughable" due to the thousands of people indicted each year in Dallas County.[57] Finally, Ms. Moore testified that she never spoke to DA Watkins about the Hill case other than during the pitch session.[58]

Ms. Strittmatter and Ms. Martin each testified that DA Watkins never said anything to them about Ms. Blue.[59] They testified that the only involvement by DA Watkins in the case was his attendance at the pitch session.[60] Ms. Martin remembered DA Watkins making comments and suggestions during the pitch session but that was the only time he discussed the case with her.[61]

---

[54] 4 R.R. at 38.
[55] 4 R.R. at 39.
[56] 4 R.R. at 43-44.
[57] 4 R.R. at 51, 53.
[58] 4 R.R. at 60.
[59] 4 R.R. at 81, 107, 163.
[60] 4 R.R. at 85, 162.
[61] 4 R.R. at 163-64.

In an effort to bolster his equal protection claim, Mr. Hill's lawyers questioned Ms. Strittmatter and Ms. Martin about the prosecution of cases involving fraud on a loan application where the funding party makes no complaint and the money is repaid. Ms. Strittmatter termed this "unexceptional," explaining that the office frequently pursues cases where the defendant attempts to procure funds by fraud but never gets the money.[62] Ms. Martin testified about four other instances where the DA's Office prosecuted what she considered similar crimes.[63]

Based on these answers about similar cases, Mr. Hill's lawyers asked Ms. Strittmatter and Ms. Martin about cases involving ***exactly*** the same facts. Both of them stated that they were unaware of any case involving precisely the same facts.[64] But no one identified any person similarly situated to Mr. Hill and not prosecuted by the DA's Office.[65]

According to the trial court, testimony during the hearing made the case "smell really bad."[66] The trial court concluded that the refusal by DA Watkins to testify violated Mr. Hill's "right" to an evidentiary hearing:

---

[62] 4 R.R. at 115, 126.
[63] 4 R.R. at 180, State's Exh. 5.
[64] 4 R.R. at 127, 155.
[65] 4 R.R. at 127, 155.
[66] 4 R.R. at 192.

> If he has a right to have a hearing and the State is denying him that right by failing to testify, it seems to me – I'm thinking that --- because, right now, he's being denied his rights to have this hearing – that he's entitled to a dismissal.[67]

The trial court announced that "because of the failure of Mr. Watkins to testify in this hearing, the Defendant has been denied his right to have a meaningful hearing on his Motion to Dismiss. And on that basis, I'm dismissing the cases."[68] The trial court's findings of fact and conclusions of law likewise state that the refusal by DA Watkins to testify denied Mr. Hill of "his right to have a meaningful hearing" on his motion.[69]

The trial court orally pronounced dismissal during the hearing on March 7, 2013.[70] Two weeks later, on March 22, the trial court informed counsel for the parties that written orders were being prepared.[71] Yet when the trial court finally signed written orders dismissing the cases with prejudice weeks later, those orders were dated March 7, 2013—the date of oral pronouncement.[72]

The State filed a motion for judgment nunc pro tunc based on the

---

[67] 4 R.R. at 192.
[68] 4 R.R. at 219.
[69] App. 2 at 37-38.
[70] 4 R.R. at 219.
[71] CR-180-III at 1461-67; CR-182-III at 1339-45; CR-183-III at 1338-44; CR-191-II at 886-91, 906.
[72] CR-180-III at 1100; CR-182-III at 978; CR-183-III at 977; CR-191-II at 577.

backdated orders, but the trial court never amended them.[73] Meanwhile—suspecting the orders might be backdated when issued—the State had perfected this appeal on March 27, 2013.[74] Nearly five months later, on August 2, 2013, the trial court filed findings of fact and conclusions of law.[75]

On August 23, 2013, a specially appointed visiting judge conducted a de novo review of the trial court's contempt finding against DA Watkins. The visiting judge acquitted DA Watkins of contempt, holding that: (1) the evidentiary hearing was improper due to Mr. Hill's failure to provide evidence establishing his entitlement to it, and (2) DA Watkins properly refused to testify based on the work product exemption.[76]

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in conducting an evidentiary hearing and ordering DA Watkins to testify. Under U.S. Supreme Court precedent, American courts considering claims of prosecutorial misconduct under federal law must presume that prosecutors act in good faith until

---

[73] CR-180-III at 1461-67; CR-182-III at 1339-45; CR-183-III at 1338-44; CR-191-II at 886-91.
[74] CR-180-III at 1154-55; CR-181-III at 1025-26; CR-182-III at 1032-33; CR-183-III at 1031-32; CR-191-II at 589-90.
[75] CR-180-S at 78-116; CR-182-S at 78-116; CR-183-S at 77-115; CR-191-S at 63-101.
[76] The State has requested that the judgment of acquittal—which was signed only a week before the filing of this brief—be included in a supplemental clerk's record to be filed in this court.

receiving clear evidence to the contrary. To obtain an evidentiary hearing, Mr. Hill had to tender evidence sufficient to establish a prima facie case of some constitutional violation. But Mr. Hill tendered no evidence—clear or otherwise. He simply made unsworn allegations and tendered unauthenticated documents. The trial court abused its discretion in granting Mr. Hill an evidentiary hearing absent supporting evidence.

Independently, the trial court abused its discretion in ordering the evidentiary hearing because even Mr. Hill's unauthenticated exhibits fell short of establishing any constitutional violation. Mr. Hill failed to identify any similarly situated person whom the DA's Office declined to prosecute for mortgage fraud—something the Supreme Court has deemed an "absolute requirement" for a selective prosecution claim. Similarly, under the Court's recent *Caperton* decision, Ms. Blue's campaign contributions do not raise any question of prosecutorial partiality. Finally, Mr. Hill relied on a presumption of vindictiveness to support his claim of vindictive prosecution. But that presumption does not apply to pretrial proceedings.

The propriety of the evidentiary hearing aside, DA Watkins properly asserted the work product exemption in refusing to answer questions related to his pursuit of grand jury indictments. Mr. Hill's attempt to probe the

DA's motive in seeking indictments necessarily invaded internal assessments of the case—the heart of any DA's work product. And the State did nothing to waive this objection. The Martin and Strittmatter affidavits did not disclose confidential information sufficient to waive privilege (indeed, they did not reveal confidential information at all).

Finally, even if Mr. Hill had established his entitlement to a hearing and dismissal, the proper remedy was dismissal without prejudice. This would have cured any purported "taint" associated with the indictments while permitting the State to pursue new ones consistent with Mr. Hill's constitutional rights. Mr. Hill was not entitled to an order immunizing him from prosecution for his criminal conduct.

ARGUMENT

The trial court dismissed the indictments in this case following allegations of constitutional infirmity in seeking indictments. Constitutional claims are governed by constitutional standards—not smell tests. Yet the trial court granted Mr. Hill an evidentiary hearing without applying the appropriate constitutional standard. Then, rather than requiring the DA's Office to procure new indictments untainted by impure motive, the trial court immunized Mr. Hill from future prosecution for his criminal

conduct—whether or not conducted in conformity with constitutional requirements. In taking both actions, the trial court abused its discretion.

The trial court's decisions to conduct an evidentiary hearing and dismiss the indictments with prejudice are reviewed for abuse of discretion. *See generally State v. Terrazas*, 970 S.W.2d 157, 159 (Tex. App.—El Paso 1998), *aff'd*, 4 S.W.3d 720 (Tex. Crim. App. 1999). A trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference to guiding legal principles. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). A trial court has no discretion to apply the law improperly. *See In re Poly-America, L.P.* 256 S.W.3d 377, 349 (Tex. 2008). Finally, the trial court's legal conclusions are reviewed under a de novo standard of review. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

The trial court filed its findings of fact and conclusions of law on August 2, 2013, more than a month after the filing of the complete record in this court.[77] As a result, the trial court lacked jurisdiction to make the findings and they should not be considered. *Berry v. State*, 995 S.W.2d 699, 700-01 (Tex. Crim. App. 1999) (citing *Green v. State*, 906 S.W.2d 937, 939 (Tex. Crim. App. 1995)).

[77] App. 2; CR-180-S at 78-116; CR-182-S at 78-116; CR-183-S at 77-115; CR-191-S at 63-101.

I. The trial court erred in ordering an evidentiary hearing.

A prosecutor possesses broad authority in determining whom to prosecute. *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982). So long as the prosecutor has probable cause to believe the accused committed an offense, the decision whether to bring a case before the grand jury generally rests entirely in the prosecutor's discretion. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

Of course, "a prosecutor's discretion 'is subject to constitutional constraints.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted). But assertion of a constitutional claim based on a prosecutor's charging function asks a court "to exercise judicial power over a 'special province' of the Executive." *Id.* (citation omitted). "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

As a result of these concerns, courts addressing challenges to the exercise of prosecutorial discretion presume that prosecutors act in good faith to discharge their duty to bring criminals to justice. *Armstrong*, 517 U.S. at 464 (citation omitted); *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim.

App. 2004) (stating that "[c]ourts must presume that a criminal prosecution is undertaken in good faith and in nondiscriminatory fashion to fulfill the State's duty to bring violators to justice"). "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Armstrong*, 517 U.S. at 464 (quoting *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)).

Mr. Hill sought an evidentiary hearing to ascertain the DA's motives for prosecution. The trial court dismissed the indictments because the refusal by DA Watkins to testify denied Mr. Hill of his "right" to do so. Thus, if Mr. Hill failed to meet the standard required to merit an evidentiary hearing—if he never was entitled to that hearing in the first place—then the trial court abused its discretion by dismissing the indictments based on the lack of a "meaningful" hearing.

A. All Claims: Mr. Hill presented no evidence to support his request for a hearing.

Mr. Hill's motion seeking an evidentiary hearing contained no evidence other than the mostly irrelevant transcript excerpts. He did not support any of his central allegations—about campaign contributions, text messages, and frequent telephone calls—with evidence. Mr. Hill did not tender any affidavit testimony and made no effort to introduce any of his

attachments into evidence—something that would have been difficult given obvious authentication and hearsay problems.[78]

Only the transcript excerpts can even arguably be considered evidence. And they provide scant support for Mr. Hill's claims. Two of the excerpts contain the previously mentioned testimony by Ms. Blue concerning her previous representation of DA Watkins and the two 60-second conversations with him. Another consists of Mr. Malouf's deposition testimony that he overheard one of those 60-second conversations.[79]

The remaining two deposition transcripts consist of a single page of testimony from Alan Strubel that he sent the Malouf firm a congratulatory e-mail related to the Hill case, and an excerpt from the deposition of another witness that contains only the cover, appearance, and certification pages but no actual testimony.[80] The evidentiary hearing transcripts consist only of the Hills' invocation of their Fifth Amendment rights during the federal fee trial.[81]

Taken together, the only possible "evidence" tendered by Mr. Hill established that: (1) Ms. Blue and DA Watkins had two 60-second

[78] Mr. Hill offered these documents during the evidentiary hearing. But he made no effort to do so until after the trial court already had granted his request for the hearing.
[79] CR-180-I at 438-43; CR-182-I at 434-39; CR-183-I at 434-39; CR-191-I at 433-38.
[80] CR-180-I at 449-52; CR-182-I at 445-48; CR-183-I at 445-48; CR-191-I at 444-47.
[81] CR-180-I at 461-78; CR-182-I at 457-74; CR-183-I at 457-74; CR-191-I at 456-73.

conversations concerning the Hill indictments, neither of which involved any substantive discussion, (2) Alan Strubel congratulated the Malouf firm, and (3) the Hill invoked their Fifth Amendment rights during the federal attorney's fee trial. That is all. The guts of Mr. Hill's motion—the various allegations concerning Ms. Blue and DA Watkins—lack any evidentiary support and instead were supported only by allegation and unauthenticated attachments.

The trial court's findings concerning Mr. Hill's "evidence" are puzzling. During the hearing, the trial court specifically instructed Mr. Hill's lawyers that "your exhibits on your motions are not evidence."[82] Yet in its findings of fact, the trial court reversed field and concluded "that the evidence presented by Defendant in support of his request for an evidentiary hearing" supported his entitlement to the hearing.[83] What evidence? These are the very same exhibits the trial court earlier—and properly—said were ***not*** evidence. When the trial court convened the evidentiary hearing, Mr. Hill had yet—by the trial court's admission—to tender any supporting evidence.

[82] 3 R.R. at 23-24.
[83] CR-180-S at 103; CR-182-S at 103; CR-183-S at 102; CR-191-S at 88.

In *Armstrong*, the Supreme Court made clear that the requirement to obtain an evidentiary hearing or discovery in connection with prosecutorial misconduct claims is one of ***evidence***—not ***allegation***. The Court repeatedly used the word ***evidence*** to describe this burden:

> In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear ***evidence*** to the contrary.
>
> In this case we consider what evidence constitutes some ***evidence*** tending to show the existence of the discriminatory effect element.
>
> [I]n the absence of clear ***evidence*** to the contrary, courts presume that [prosecutors] have properly discharged their official duties.
>
> The vast majority of the Courts of Appeals require the defendant to produce some ***evidence*** that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law.

Armstrong, 517 U.S. at 464, 465, 469 (emphasis added) (citations omitted) (internal quotation marks omitted). These repeated references to ***evidence*** were not carelessness. They reflect the presumption of good faith accorded to prosecutors—and the legal requirement that this presumption must be overcome by ***evidence***.

This evidentiary requirement applies to any request to explore prosecutorial motive—even discovery. In *Armstrong*, the Court held that "the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 463-64. Thus, "*Armstrong* effectively required proof of an equal protection violation before a court could allow the defendant to engage in discovery of the prosecution's motive." Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 750 (1999). "Without explicitly saying so, the Court made protection of prosecutor motives paramount to the defendant's ability to assert a selective prosecution claim." *Id.* at 751.

If *Armstrong* left any lingering doubt about this evidentiary requirement, the Fifth Circuit resolved it in 2005 by holding that under *Armstrong*:

> Before a criminal defendant is entitled to ***any discovery*** on a claim of selective prosecution, he must make out a prima facie case. The prima facie case of selective prosecution requires the criminal defendant to bring forward some ***evidence*** that similarly situated individuals of a different race could have been prosecuted, but were not. More specifically, a defendant must first present ***evidence*** of both discriminatory effect and discriminatory intent.

In re United States, 397 F.3d 274, 284 (5th Cir. 2005) (emphasis added)

(internal citations omitted).

Armstrong was a selective prosecution case. But its evidentiary requirement applies to all Mr. Hill's constitutional claims. The same separation-of-powers concerns underlying *Armstrong* apply to judicial involvement on any due process or equal protection theory. More important, pragmatic concerns mandate an evidentiary standard. If Texas criminal defendants could force district attorneys to the stand in advance of trial based solely on unsworn allegations and unauthenticated documents—no matter how compelling the accusations—our criminal justice system would grind swiftly to a halt. As a result, the Supreme Court astutely requires ***evidence*** of a prima facie case of some violation to gain an evidentiary hearing.

In this case, no one can dispute Mr. Hill's failure to tender any substantive evidence before the hearing. He simply made accusations in a motion and attached a stack of unauthenticated documents. The Supreme Court has held that a criminal defendant alleging federal constitutional violations is not entitled to probe prosecutorial motive absent ***evidence*** making out a prima facie case of a violation. The trial court erred in allowing Mr. Hill an evidentiary hearing absent such ***evidence***.

In its findings of fact and conclusions of law, the trial court held that "[c]ourts may hold evidentiary hearings to investigate alleged conflicts of interest on the part of the prosecutor."[84] But the trial court failed to mention *Armstrong* in its discussion of the law governing such hearings. Instead, the trial court cited four state court cases. And, indeed, each of the cited cases involved an evidentiary hearing on conflict-of-interest allegations. But none of the cases indicates whether: (1) the defendants tendered evidence in requesting a hearing, or (2) anyone bothered to contest the request for a hearing.[85] As a result, these cases provide no guidance—and certainly do not overcome the Supreme Court's clear statements in *Armstrong*.

Under governing case law from the Supreme Court, the trial court had to presume that DA Watkins acted in good faith until Mr. Hill presented clear evidence to the contrary. Mr. Hill had to present such evidence as ***a condition*** of receiving an evidentiary hearing. Because Mr. Hill tendered no evidence before the hearing, the trial court abused its discretion in conducting evidentiary hearing.

---

[84] CR-180-S at 101-02; CR-182-S at 101-02; CR-183-S at 100-01; CR-191-S at 86-87.
[85] See *Terrazas*, 970 S.W.2d at 160; *Landers v. State*, 256 S.W.3d 295, 300-01 (Tex. Crim. App. 2008); *State ex rel. Young v. Sixth Jud. Dist. Ct. of Appeals at Texarkana*, 236 S.W.3d 207, 209 (Tex. Crim. App. 2007); *Eleby v. State*, 172 S.W.3d 247, 249 (Tex. App.—Beaumont 2005, pet. ref'd).

B. Selective Prosecution: Mr. Hill never proved that the DA's Office failed to prosecute a similarly situated defendant.

The decision to prosecute may not be based on an unjustifiable standard such as race, religion, or any other arbitrary classification including exercise of a constitutional right. *Bordenkircher*, 434 U.S. at 364. This principle forms the basis for the claim of selective prosecution, a species of equal protection.

To prove selective prosecution, Mr. Hill had to show that (1) he was singled out for prosecution while similarly situated violators were not prosecuted; and (2) the decision to prosecute was based on an arbitrary classification such as race, religion, or the exercise of constitutional rights. *Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. 1980) (citation omitted); *see also Jarrett v. United States*, 822 F.2d 1438, 1443 (7th Cir. 1987).

The burden to identify a similarly situated but unprosecuted person is an "absolute requirement" to support even a request for discovery based on selective prosecution. *Armstrong*, 517 U.S. at 467. The Supreme Court gave teeth to this standard in *Armstrong* by holding statistical analysis suggestive of racial distinctions in prosecution insufficient to warrant relief. *Id*. at 470.

Mr. Hill never identified any similarly situated individual. He certainly

did not do so in his motion. And even during the hearing, Mr. Hill failed to provide or elicit any evidence of a single similarly situated defendant. Mr. Hill's failure to meet this "absolute requirement" meant he was not entitled to an evidentiary hearing on his claim of selective prosecution.

In his motion, Mr. Hill argued that the State's failure to invite his lawyers to address the grand jury established differing treatment sufficient to establish an equal protection violation. But Mr. Hill offered no ***evidence*** to support this claim. Instead, he provided a website printout and newspaper story—neither of which established the parameters of the purported policy. The assistant district attorneys denied that such a policy existed.[86] Ms. Moore deemed the idea of such a policy "laughable."[87]

Even if Mr. Hill's claims about denial of access to the grand jury were true, they do not establish selective prosecution. Mr. Hill's burden was to show that the ***decision to prosecute*** was selective—not that procedures in advancement of that prosecution differed from procedures in other cases.

In support of his novel claim concerning grand jury procedures, Mr. Hill relied on *Ex parte Quintana*, 346 S.W.3d 681, 685 (Tex. App.—El Paso 2009, pet ref'd). But in *Quintana*, the DA's Office refused to permit the

[86] CR-180-I at 774, 778; CR-182-I at 682, 686; CR-183-I at 681, 685.
[87] 4 R.R. at 51-53.

defendant access to pretrial diversion programs despite her uncontested eligibility under established policies. These diversion programs represented an alternative to prosecution—not merely a procedural step along the prosecutorial way.

On appeal, the court held the prosecutor's decision constituted impermissible selective prosecution. But unlike the purported differing procedural treatment in this case, the procedural denial in *Quintana* resulted in prosecution by denying the defendant access to a diversion program offering "an alternative to prosecution." *Id.* at 684. And the DA's Office in *Quintana* conceded that it treated the defendant differently from others similarly situated. *Id.* at 685. Here, the DA's Office denied any such disparate treatment. As a result, *Quintana* does not support Mr. Hill's argument.

In its findings of fact, the trial court attempted to justify its decision concerning selection prosecution by citing the Fifth Circuit's decision in *Lindquist v. City of Pasadena*, 669 F.3d 225, 233-34 (5th Cir. 2012). But *Lindquist* merely addresses the degree of similarity necessary to meet the "similarly situated" standard—it does not excuse failure to identify ***any*** similarly situated comparator. Indeed, the Fifth Circuit rejected the equal

protection claim in *Lindquist* precisely because the plaintiffs failed to identify sufficiently similar comparators. *Id.* at 234. Here, the issue is not one of the degree of similarity; Mr. Hill never identified ***any*** comparators—similar or not.

Armstrong imposes an absolute requirement for evidence of similarly situated defendants who were not prosecuted. Mr. Hill's lawyers admitted that they lacked such evidence and hoped to elicit it during the evidentiary hearing. The trial court nevertheless ordered the hearing. The Fifth Circuit took a district court to task for compelling government production of information concerning its charging decisions where counsel admitted the information was necessary to make out a prima facie case of selective prosecution, deeming this a "misapplication of *Armstrong* . . . ." *In re United States*, 397 F.3d at 284-85. This case is the same. Mr. Hill admitted through counsel his need for the evidentiary hearing to obtain facts supporting his claim. Just as in *In re United States*, the trial court misapplied *Armstrong* in ordering the hearing.

Mr. Hill's inability to provide evidence of the DA's failure to prosecute a similarly situated defendant—something the U.S. Supreme Court has deemed an absolute requirement—doomed his selective

prosecution claim. The trial court erred in granting an evidentiary hearing based on this claim.

C. Impartial Prosecutor: Ms. Blue's campaign contributions do not raise any due process issue.

The absence of an impartial and disinterested prosecutor can violate a criminal defendant's due process right. *In re Guerra*, 235 S.W.3d 392, 429 (Tex. App.—Corpus Christi-Edinburg 2007, orig. proceeding) (citation omitted). "Put another way, the due process rights of a criminal defendant are violated when a prosecuting attorney who has a conflict of interest relevant to the defendant's case prosecutes the defendant." *Id.* But "a mere potential or perceived conflict of interest" does not establish a due process violation. *Guerra*, 235 S.W.3d at 430 (citation omitted). Texas courts "do not lightly disrupt the orderly prosecution of those who have committed crimes against the State and her citizens." *Id.*

What constitutes "disinterest" remains imprecisely defined. To be sure, "[a] prosecutor is not 'partial' simply because he zealously seeks a conviction." *Id.* Partiality in this context is similar to a conflict of interest in that the prosecutor has a "personal interest or stake in the outcome of the criminal prosecution." *Id.*

Generally, cases finding a conflict of interest rest on personal pecuniary

gain or some relationship with the criminal defendant. In the trial court, Mr. Hill relied on *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984). But in *Wright*, the Second Circuit actually ***rejected*** the due process claim, noting that cases finding prosecutorial conflicts of interest usually rest on personal financial gain. As the court concluded:

> In short, this case, with the facts taken at their worst against the Government, does not present the spectacle of a prosecutor's using the "awful instruments of the criminal law," *McNabb v. United States*, 318 U.S. 332, 343, 63 S.Ct. 608, 614, 87 L. Ed. 819 (1943) (Frankfurter, J.), for purpose of private gain . . . At the very most, and the allegations scarcely go this far, it deprived him of the chance that, with another prosecutor, he might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found to be guilty.

Id. at 1058. Other cases involve a direct personal interest in the prosecution. In *Guerra*, for example, the special prosecutor had lost an election to the district attorney and was investigating charges of voter fraud by the district attorney relating to that very election. *Guerra*, 235 S.W.3d at 429-31.

Mr. Hill did not even allege that DA Watkins has a direct personal or financial interest in the outcome of this case. Unable to meet the traditional burden for showing prosecutorial bias, Mr. Hill instead alleged bias under the novel claim of campaign contributions. Mr. Hill identified no legal authority

holding that a prosecutor's impartiality may be called into question solely due to a donor's connection to a prosecution target. But the Supreme Court recently examined this issue in the context of political donations to a judge in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). *Capterton* provides the rubric for evaluation of Mr. Hill's due process claims about Ms. Blue's campaign contributions.

Caperton concerned political donations to a justice of the West Virginia Supreme Court. The donor was CEO of a company involved in litigation before the court. The donations all occurred after rendition of an enormous verdict against the company but before appeal of that verdict. The donor decided to support a challenger to the incumbent justice and contributed around $3 million to the candidate's campaign—more than the total amount contributed by all other supporters. *Id.* at 873. The candidate won and subsequently cast the deciding vote in the company's successful appeal of the verdict. In a 5-4 decision, the U.S. Supreme Court reversed on due process grounds.

Initially, the Court noted that a judge's personal or pecuniary connection to a case does not alone establish any due process violation. The Court's previous decisions distinguished between substantial and remote

interests. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that a supreme court justice who cast the deciding vote to uphold a punitive damages award in a bad-faith insurance case could not properly hear the case while also being the lead plaintiff in a nearly identical lawsuit pending in the lower courts. The justice's deciding vote "undoubtedly 'raised the stakes'" for the insurance company in his own lawsuit. *Id.* at 823-24. But other justices possessing a pecuniary interest by virtue of their potential membership in a class-action suit against their own insurance companies could hear the case because their interests were "too remote and insubstantial to violate the constitutional constraints." *Id.* at 826 (citation omitted).

Applying these principles in *Caperton*, the Court concluded that the contributions at issue presented facts "extreme by any measure"[88] due to the disproportionate share of funding. *Caperton*, 556 U.S. at 887. The Court held that in the judicial context, "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at 884.

[88] Even the "extreme circumstances" in *Caperton* divided the Court, provoking a bitter dissent and causing the majority to take pains to stress the limited nature of its holding.

Mr. Hill rested his complaint on what he contended were more than $25,000 in contributions to DA Watkins by Ms. Blue since 2007, "including $7,500 in the five-month period before the indictments were returned."[89] That sounds serious. But between 2007 and the date of the indictments, DA Watkins received ***more than $715,000*** in campaign contributions. Even during the immediate period leading to the indictments—when Ms. Blue contributed $7,500—Mr. Watkins reported total contributions exceeding $120,000.[90] Where the *Caperton* donor provided more than half of the candidate's entire financial support, Ms. Blue's contributions account for somewhere between three and six percent of the contributions to DA Watkins.

The Nevada Supreme Court recently applied *Caperton* to a case involving allegations of judicial bias. The court held that contributions from a single donor amounting to 14% of the candidate's financial contributions and 25% of in-kind donations did not raise a question about the appearance of partiality. *Ivey v. Eighth Judicial Dist. Ct. of Nev.*, 299 P.3d 354 (Nev. 2013). Here, even if the entire amount of the SMU scholarship somehow were considered a campaign contribution—which it obviously was not—this still

[89] CR-180-I at 39; CR-182-I at 35; CR-183-I at 35; CR-191-I at 34.
[90] CR-180-I at 106-13; CR-182-I at 102-09; CR-183-I at 102-09; CR-191-I at 101-08.

would bring Ms. Blue's total to only around 15 percent of the total contributions during the relevant period. Under both *Caperton* and *Ivey*, this falls short of establishing improper prosecutorial partiality.

Under these circumstances and utilizing the rubric established by *Caperton*, Ms. Blue's contributions simply do not approach the level necessary to establish a due process violation.

D. Vindictive Prosecution: Mr. Hill relied on a presumption of vindictiveness that applies only at the trial stage.

Prosecutorial vindictiveness claims ordinarily arise when a prosecutor increases the charges against a defendant after a successful appeal and remand, or threatens more serious charges if a defendant does not accept a plea offer. *See, e.g.*, *Blackledge v. Perry*, 417 U.S. 21 (1974); *Bordenkircher*, 434 U.S. at 362.

Vindictive prosecution cases may be established based either on (1) presentation of circumstances sufficient to raise a rebuttable presumption of prosecutorial vindictiveness, or (2) proof of actual vindictiveness, which means direct evidence that the prosecutor's charging decision was an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right. *Neal*, 150 S.W.3d at 173 (citations omitted).

Lacking direct evidence of vindictiveness, Mr. Hill relied on the presumption of prosecutorial vindictiveness. But this presumption applies only after trial—not to pretrial proceedings. In *Goodwin*, the Supreme Court held that where misconduct occurred before trial, "the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted." *Goodwin*, 457 U.S. at 381. The Court noted the "good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting." *Id.*

According to the Texas Court of Criminal Appeals, *Goodwin* means that "the presumption of vindictiveness prong rarely—if ever—applie[s] outside the context of prior conviction, successful appeal, and post-appeal enhanced charging decision . . . ." *Neal*, 150 S.W.3d at 173 n.12 (citing *Goodwin*, 457 U.S. at 381). Other courts similarly hold that Goodwin precludes application of the presumption to pretrial proceedings. *See* WAYNE R. LAFAVE, JEROLD H. ISREAL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 13.7(c) n.43 (3d ed. 2010) (citing First, Sixth, Seventh, Eighth, and Ninth Circuit cases for this proposition); *see also, e.g., United States v. Johnson*, 91 F.3d 695, 698 (5th Cir. 1996); *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000).

This, of course, does not preclude a showing of actual vindictiveness; it just means that proof is required. *Goodwin*, 457 U.S. at 384. Thus, Mr. Hill bore the burden to establish actual vindictiveness by introducing direct evidence that the charging decision was a "direct and unjustifiable penalty" resulting ***solely*** from the exercise of a protected legal right. *Neal*, 150 S.W.3d at 173 (citation omitted). In short, he had to prove that he would not have been prosecuted except for the animus. *United States v. Koh*, 199 F.3d 632, 640 (2d Cir. 1999) (citation omitted). The State could "stand mute unless and until [Mr. Hill carried] his burden of proof . . . ." *Neal*, 150 S.W.3d at 175 (citation omitted).

Mr. Hill alleged that DA Watkins prosecuted him in retaliation for engaging in civil litigation against both his father and Ms. Blue. But Mr. Hill offered no ***direct evidence*** that the charging decision was a penalty for his actions in the civil litigation. In fact, his attorneys admitted that they needed the evidentiary hearing to "elicit" evidence that Mr. Hill was "vindictively and selectively prosecuted."[91]

Independently, Mr. Hill offered no evidence that he would not have been prosecuted except for the purported animus. This deficiency arises

[91] 2 R.R. at 16 (emphasis added).

from Mr. Hill's failure to establish that the DA's Office normally declines to prosecute these types of cases. In short, Mr. Hill thought he had only to raise a presumption of vindictiveness when in actuality he had to provide direct evidence of it.

The lead case cited by Mr. Hill in the trial court illuminates the critical defect in his motion. In *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the Sixth Circuit held that a criminal defendant presented allegations of vindictive prosecution sufficient to justify discovery concerning whether the government prosecuted her for tax fraud in retaliation for filing a discrimination complaint against the EEOC. The defendant supported her motion with affidavit testimony. A former internal revenue agent testified that the IRS did not prosecute similar cases and that, in his opinion, the case was prosecuted in retaliation for the discrimination complaint (this, of course, is the critical missing evidence in support of Mr. Hill's motion). Moreover, a former EEOC office director testified that the EEOC had pushed the investigation in "revenge" for the complaint.

Adams involved direct evidence of retaliatory prosecution. In stark contrast, Mr. Hill presented no testimony or evidence that the DA's Office ever has declined to prosecute any similar case. He presented no direct

evidence that Ms. Blue encouraged the prosecutions or even discussed them substantively. He presented no evidence that any purported animus motivated the charging decision. As a result, Mr. Hill failed to establish his entitlement to an evidentiary hearing based on prosecutorial vindictiveness.

E. All Claims: The trial court improperly drew an adverse inference against the State.

The trial court drew adverse inferences against the State based on the assertion by DA Watkins of privilege, and Ms. Blue's assertion of her Fifth Amendment rights.[92] The trial court justified this adverse inference by citing cases holding that such an inference may be drawn in a civil case.[93] But this is a criminal case. The Texas Rules of Evidence plainly provide that "the claim of a privilege . . . is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom." TEX. R. EVID. 513(a). The only exceptions are for civil cases and assertions of spousal privilege. TEX. R. EVID. 513(c), 504(b)(2). Thus, the trial court erred in drawing any adverse inference in this criminal case.

F. Conclusion: The evidentiary hearing never should have occurred.

Mr. Hill was not entitled to an evidentiary hearing until he established

[92] CR-180-S at 98-99; CR-182-S at 98-99; CR-183-S at 97-98; CR-191-S at 83-84.
[93] CR-180-S at 104; CR-182-S at 104; CR-183-S at 103; CR-191-S at 89 (citing *Webb v. Maldonado*, 331 S.W.3d 879 (Tex. App.—Dallas 2011, pet. denied).

a prima face case of a constitutional violation. The State has no burden to rebut constitutional claims until the defendant establishes a prima facie case supporting them. *See Quintana*, 346 S.W.3d at 686-87 (citation omitted); *see also United States v. Falk*, 479 F.2d 616, 623-24 (7th Cir. 1973).

Mr. Hill's failure to make a prima facie showing under any of his asserted constitutional theories means the trial court erred in affording him an evidentiary hearing and then dismissing the indictments based on whether that evidentiary hearing was meaningful.

II. DA Watkins properly asserted the work product exemption.

A. Mr. Hill sought to invade protected work product.

Mr. Hill sought to discover the basis for the decision by the DA's Office to seek indictments against him. This would have revealed what DA Watkins believed to be the strengths—and possibly the weaknesses—of the State's case in advance of trial. It would have constituted a tutorial for Mr. Hill's attorneys in how to prepare his defense for trial with the benefit of the prosecution's case assessment. These strategies and assessments go to the very heart of the work product exemption.

The work product doctrine is vital in assuring the proper functioning of the criminal justice system. *United States v. Nobles*, 422 U.S. 225, 238

(1975). "The primary purpose of the work product rule is to shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case." *Owens Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991) (citation omitted); *see also Nobles*, 422 U.S. at 238.

The exemption covers more than just documents; it extends to an attorney's mental impressions, opinions, conclusions, and legal theories as well as the selection and ordering of documents. *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993). The work product exemption is far broader than the attorney-client privilege because it includes all communications made in preparation for trial. *See Hickman v. Taylor*, 329 U.S. 495, 508-09 (1947). Under Texas law, core work product is not discoverable under any circumstance. *In re Bexar County Criminal District Attorney's Office*, 224 S.W.3d 182 (Tex. 2007) (stating that "[c]ore work product is sacrosanct and its protection impermeable").

As an independent protection, the Texas Supreme Court recognizes a privilege protecting information related to ongoing criminal cases. Using the Texas Open Records Act for guidance, the Court has recognized this law enforcement privilege as an exemption from discovery. *See Hobson v. Moore*,

734 S.W.2d 340, 341 (Tex. 1987). The law enforcement exception encompasses (1) information held by a prosecutor that deals with the investigation or prosecution of crime, and (2) internal records of a prosecutor maintained for internal use in prosecution. *See* TEX. GOV'T CODE ANN. § 552.108 (West Supp. 2009).

The invasion of work product in this case is evident both from the face of the subpoena and Mr. Hill's purported justifications for questioning DA Watkins. Mr. Hill made no secret that his intention was to probe the decision to prosecute. Answering these questions necessarily would have required DA Watkins to reveal his thought processes and trial strategies, including his assessment of the strengths and weaknesses of the case. This is the very essence of an attorney's work product. Indeed, the United States Supreme Court has recognized explicitly that responding to this type of selective prosecution claim "may disclose the Government's prosecutorial strategy." *Armstrong*, 517 U.S. at 468.

B. The State did not waive the work product protection.

1. All hearing testimony occurred under duress.

The trial court found that the State's failure to object during the hearing testimony of Ms. Strittmatter, Ms. Martin, and Ms. Moore waived

any work product protection. But Rules 511 and 512 of the Texas Rules of Evidence establish that compelled disclosure does not waive privilege. Rule 511 requires that waiver of privilege be undertaken "voluntarily," while Rule 512 prohibits a privilege claim from being defeated by erroneously compelled disclosure. TEX. R. EVID. 511, 512.

Attorneys for the State and Ms. Moore filed motions to quash the various subpoenas. The State then argued repeatedly during the February 14 hearing that no testimony concerning what led to the indictments was permissible. And the State made clear that its objection extended to "Craig Watkins, Terri Moore, Sharon – it's all the employees of the State."[94] The trial court denied the motions to quash and overruled the objections. The trial court even denied the State any opportunity to present evidence to support its privilege claims:

> MR WILSON: We'd like to present evidence regarding our claim of privilege. We –
>
> THE COURT: No.
>
> MR. WILSON: - we had not -
>
> THE COURT: Denied. Please have a seat.[95]

[94] 2 R.R. at 51.
[95] 4 R.R. at 8.

Both the trial court and Mr. Hill's lawyers acknowledged the State's unsuccessful presentation of its privilege claims before any testimony. Mr. Hill's lawyer stated that the State "argued up one side and down the other about privileges and work-product protections that I understand Your Honor's overruled . . . ."[96] The trial court also noted that these arguments had been made and overruled.[97] Thus, all testimony at the March 7 hearing took place ***after*** the trial court's denial of the motions to quash and overruling of the privilege objections. In no sense, then, can any of this testimony be characterized as the voluntary disclosure of privileged information required by Rule 511. Instead, the testimony all was erroneously compelled as contemplated by Rule 512.

2. The Strittmatter and Martin affidavits did not waive privilege.

The trial court erroneously believed that any disclosure of work product by the DA's Office waived the privilege.[98] But that is not the law in Texas. In fact, the Texas Rules of Evidence permit a party to disclose some work product without waiving privilege. Rule 511 states that only disclosure

[96] 4 R.R. at 64.
[97] 4 R.R. at 11.
[98] 4 R.R. at 16.

of "a significant amount" of privileged information constitutes waiver. As this court has noted:

> The most important words in rule 511 are the words "voluntary" and "significant." The relator must have voluntarily disclosed ***a significant amount*** of privileged information to have waived her privilege. The standard rule for waiver is that it must be the intentional relinquishment of a known right.

Gaynier v. Johnson, 673 S.W.2d 899, 905 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 686 S.W.2d 105 (Tex. 1985).

The State offered short affidavits from Ms. Strittmatter and Ms. Martin for the limited purpose of establishing that Mr. Hill could not meet the elements of his equal protection claim, and to rebut any accusation that they knew about Mr. Hill's dispute with Lisa Blue. The affidavits deal principally—indeed almost exclusively—with general policies and procedures used by the DA's Office. They say little about the specifics of the case against Mr. Hill. Ms. Strittmatter's affidavit said:

> I am currently employed as an assistant district attorney in the Dallas County District Attorney's Office. I have worked in the office for 9 years. I have been assigned as a prosecutor within the Specialized Crime Division for the last 8 years. I became deputy chief of the Specialized Crime Division in early 2009, and was promoted to the division chief position later that same year.

The Specialized Division handles its own intake on its cases. Victims, as well as other individuals, regularly contact the division's prosecutors directly about possible offenses rather than reporting them first to another investigating agency.

In February 2010, I received a complaint from Mike Lynn alleging numerous fraudulent acts committed by Albert Hill, III in 2009 during a loan transaction with OmniAmerican Bank. Mr. Lynn's complaint was accompanied by fifty-three pages of supporting documentation. I assigned prosecutor Stephanie Martin to investigate the complaint. Ms. Martin investigated it for several months; updated me periodically as she received and reviewed evidence; and consulted with me in the drafting of the indictments that resulted from her investigation. During the investigation that was being conducted by Ms. Martin, I did not speak to Lisa Blue about this case, and I was unaware of the fee-dispute litigation between Ms. Blue and Mr. Hill.

Throughout my time in the Specialized Crime Division we have not had a policy requiring a prosecutor to notify a suspect that he or she is the target of a criminal investigation. Notification of that nature is left within the discretion of the prosecutor handling the case. Nor do we have a policy requiring that a defendant be given the opportunity to be heard by the Grand Jury before indictment.[99]

[99] CR-180-I at 774-75; CR-182-I at 682-83; CR-183-I at 681-82.

Ms. Martin's affidavit said:

> I am currently employed as an assistant district attorney in the Dallas County District Attorney's Office. I have worked in the office for a total of more than seven years (January 2002 to October 2003 and April 2007 to present). I was assigned to the Specialized Division for four years. I became the mortgage fraud prosecutor when the position was created in 2007 and, for the next four years, I handled all of the mortgage fraud cases.
>
> The Specialized Division handles its own intake on its cases. Victims, as well as other individuals, regularly contact the division's prosecutors directly about possible offenses rather than reporting them first to another investigating agency.
>
> In February 2010, the chief of the division, Donna Strittmatter, received a complaint from Mike Lynn alleging numerous fraudulent acts committed by Albert Hill, III in 2009 during a loan transaction with OmniAmerican Bank. Mr. Lynn's complaint was accompanied by fifty-three pages of supporting documentation. A copy of this complaint and documentation is attached to this affidavit. *See* Exhibit A.
>
> Ms. Strittmatter instructed me to investigate the allegation in the complaint. Shortly after I began my investigation, I received a second complaint accusing Mr. Hill of fraud in the 2009 loan transaction. I received this complaint from David Pickett, the trustee of the trust that purchased 80% of Mr. Hill's house in 2004. It, too, was accompanied by supporting documentation.

For the next several months, I personally investigated the allegations against Mr. Hill. During that time, I subpoenaed a voluminous amount of documentation, including OmniAmerican Bank's file, Fidelity Title's file, records related to the 2004 sale of Mr. Hill's home, and various other bank and title records. I also obtained the deposition testimony of several individuals, including Mr. Hill, and I spoke to the legal counsel for OmniAmerican Bank. During my investigation, I did not speak to Lisa Blue about this case, and I was unaware of the fee-dispute litigation between Ms. Blue and Mr. Hill.

In early 2011, after a thorough review of the evidence I had amassed, I presented the cases to the Grand Jury, and the Grand Jury chose to indict Mr. Hill.

The Specialized Division regularly prosecutes crimes similar to those committed by Mr. Hill. Since 2007, our division has obtained over thirty indictments for the offense of making a materially false or misleading statement to obtain property or credit. Nearly half of those involved property or credit valued at $200,000 or more. Since 2007, our division has also obtained over 200 indictments for securing the execution of a document by deception; ten of those cases involved property valued at $200,000 or more. The decision to prosecute these cases was not determined by whether or not someone suffered an actual loss. Prior to Mr. Hill's indictment, I personally and successfully prosecuted four other mortgage fraud cases where no money was funded and, thus, no actual loss was suffered.

> During my tenure in the Specialized Division, it was not my practice to provide the subjects of my mortgage fraud investigations with notice that they were the target of an investigation. Nor would I provide them with the opportunity to be heard by the Grand Jury before indictment.[100]

Under any fair reading, neither affidavit can be said to disclose "a significant amount" of privileged information. To the contrary, any disclosure of privileged information is exceptionally limited and does not waive privilege.

III. The trial court erred in dismissing the cases with prejudice.

A trial court generally lacks authority to dismiss a criminal case without the prosecutor's consent. *State v. Johnson*, 821 S.W.2d 609, 613 (Tex. Crim. App. 1991) (en banc); *State v. Plambeck*, 182 S.W.3d 365, 269 (Tex. Crim. App. 2005) (en banc). But an exception exists for prosecutorial misconduct involving denial of federal constitutional rights. *See State v. Frye*, 897 S.W.2d 324, 330 (Tex. Crim. App. 1995) (en banc).

The U.S. Supreme Court has not determined "whether dismissal of the indictment, or some other sanction, is the proper remedy" for prosecutorial misconduct involving denial of equal protection or due process.

[100] CR-180-I at 777-78; CR-182-I at 685-86; CR-183-I at 684-85.

See Armstrong, 517 U.S. at 461 n.2 (1996). But in the Sixth Amendment context, the Texas Court of Criminal Appeals has instructed trial courts that when a constitutional violation occurs they must "identify and then neutralize the taint by tailoring relief appropriate in the circumstances" to restore constitutional compliance. *Frye*, 897 S.W.2d at 330 (quoting *United States v. Morrison*, 449 U.S. 361, 365 (1981)).

Under this rule, dismissal is proper only "where the trial court is unable to identify and neutralize the taint by other means." *Id.* (citation omitted). The basic question, then, is whether re-indictment of Mr. Hill could occur consistent with constitutional principles. *See, e.g.*, *Cook v. State*, 940 S.W.2d 623, 627-28 (Tex. Crim. App. 1996) (en banc) (remand appropriate because retrial possible consistent with constitutional principles despite taint of misconduct). This mirrors the general rule in cases involving trial errors, where courts hold that reversing the conviction and providing "a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982).

In this case, the purported taint was presentation to the grand jury based on impure motives. The remedy, then, was dismissal of the

indictments procured by that presentation—not a permanent bar to prosecution of Mr. Hill's criminal conduct. Some constitutional violations, for example the prohibition against double jeopardy, implicate a right not to be tried at all. But a due process violation caused by prosecutorial misconduct is not a violation of a right not to be tried. *See generally Hollywood Motor Car*, 458 U.S. at 268. Thus dismissal with prejudice—a drastic remedy "rarely seen in criminal law, even for constitutional violations"—was inappropriate. *Reed v. Farley*, 512 U.S. 339, 368 (1994) (Blackmun, J. dissenting).

In this case, the trial court could have dismissed the purportedly tainted indictments without prejudice and required the State to procure new ones. "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds." *United States v. Taylor*, 487 U.S. 326, 342 (1988).

The trial court relied heavily—both during the hearing and in its findings—on the decision in *Terrazas*. But in *Terrazas*, the court of appeals held that the trial court abused its discretion in dismissing an indictment with prejudice when the claimed taint was curable by dismissing without

prejudice and forcing the DA to start anew in deciding whether to seek indictments. *Terrazas*, 970 S.W.2d at 160. Similarly, most federal courts addressing prosecutorial misconduct at the grand jury stage hold that dismissal without prejudice is an appropriate remedy. *See, e.g.*, *United States v. Slough*, 679 F. Supp.2d 55, 61 (D.D.C. 2010); *United States v. Lawson*, 502 F. Supp. 158, 172 (D. Md. 1980); *United States v. Feurtado*, 191 F.3d 420, 424-25 (4th Cir. 1999); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979); *United States v. Breslin*, 916 F. Supp. 438, 446 (E.D. Pa. 1996); *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414, 1440 (D. Md. 1986).

The trial court's order of dismissal with prejudice went too far under these circumstances. "While defendants are entitled to the remedy of dismissal for violations of their constitutionally protected rights, they are not entitled to the reward of permanent immunity respecting their alleged criminal conduct . . . [T]he costs to society are simply too high." *Lawson*, 502 F. Supp. at 173.

Had the trial court dismissed the cases without prejudice, DA Watkins could have pursued new indictments unshackled by any motive to assist Ms. Blue. Alternatively, he could have appointed a prosecutor pro tem to decide whether to pursue new indictments. TEX. CODE. CRIM. PROC. ANN. art.

2.07(a) & (b-1) (West 2005). No taint would apply to a prosecutor pro tem, who is considered a substitute for the district attorney rather than a subordinate. *See, e.g., State v. Newton*, 158 S.W.3d 582, 585-86 (Tex. App.—San Antonio 2005, pet. dism'd); *State v. Ford*, 158 S.W.3d 574, 576-77 (Tex. App.—San Antonio 2005, pet. dism'd); *Stephens v. State*, 978 S.W.2d 728, 731 (Tex App.—Austin 1998, pet. ref'd).

In this case, nothing prevents new indictments consistent with due process and equal protection guarantees. As a result, "[a] dismissal with prejudice is simply constitutional overkill." *State v. Terrazas*, 962 S.W.2d 38, 45 (Tex. Crim. App. 1998) (en banc) (Keller, J., dissenting). A Texas trial court abuses its discretion by granting relief beyond that necessary to neutralize the taint of any constitutional violation. *See id.* at 42. Because dismissal without prejudice would have neutralized the purported taint, the trial court abused its discretion in dismissing the indictments with prejudice.

Conclusion

The trial court erred in ordering the evidentiary hearing, overruling the work product objection asserted by DA Watkins, and dismissing the indictments with prejudice. The trial court's judgments should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

Craig Watkins
Criminal District Attorney
Dallas County, Texas

s/Charles "Chad" Baruch
Texas Bar Number 01864300
Special Prosecutor
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028

Michael R. Casillas
Texas Bar Number 03967500
Chief Prosecutor – Appellate Division
Frank Crowley Courts Building
133 North Riverfront Blvd., LB-19
Dallas, Texas 75207-4399
Telephone: (214) 653-3600
Facsimile: (214) 653-5774

Counsel for The State of Texas

Certificate of Compliance

This brief was prepared using Microsoft Word for Mac. Relying on the word count function in that software, I certify that this brief contains 12,013 words.

s/Charles "Chad" Baruch
Attorney for Appellant

Certificate of Service

The undersigned certifies that a true and correct copy of this instrument was served this 29th day of August, 2013, by United States mail, upon the following counsel of record for appellee:

John C. Hueston
IRELL & MANELLA, LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067

George R. Milner III
MILNER FINN PRICE
2828 North Harwood Street, Suite 1950
Dallas, Texas 75201

Michael Mowla
603 North Cedar Ridge, Suite 100
Duncanville, Texas 75116

s/Charles "Chad" Baruch

1

644/337

CAUSE NOS. F-1100180, F-1100182, F-1100191, F-1100183

THE STATE OF TEXAS	§	**IN THE 204TH JUDICIAL**
	§	
VS.	§	**DISTRICT COURT**
	§	
ALBERT G. HILL, III	§	**DALLAS COUNTY, TEXAS**

ORDER GRANTING MOTION TO DISMISS

The Court, on the 7th day of March, 2013, having considered the Defendant's Motion to Dismiss and the attachments thereto, the State's response to the motion, the evidence presented at the hearing on the motion, and the argument of counsel, found that the defendant has been denied his right to a full and fair hearing on his motion to dismiss due to the refusal of the District Attorney to testify at the hearing concerning the matters raised in the motion. The District Attorneys Office did thereby deny the defendant his due process rights under the constitutions of this State and United States.

IT IS THEREFORE ORDERED that the Motion to Dismiss is **GRANTED** and this case is dismissed with prejudice.

SIGNED the 7th of March, 2013.

LENA LEVARIO, JUDGE
204TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

2

CAUSE NOS. F-1100180, F-1100181, F-1100182, F-1100183 AND F-1100191

STATE OF TEXAS	§	IN THE 204TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
ALBERT G. HILL, III	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ALBERT G. HILL, III'S MOTION TO QUASH AND DISMISS THE INDICTMENTS

Defendant Albert G. Hill, III's *Motion to Quash and Dismiss the Indictments Due to Prosecutorial Misconduct* was heard on February 14, 2013, and March 7, 2013, by the 204th Criminal Court of Dallas County, Texas, Judge Lena Levario presiding. Having fully considered the law, testimony, evidence, and arguments in this case, the Court hereby dismisses the indictments.

I. FINDINGS OF FACT

A. Background Facts

1. Defendant Albert G. Hill, III is the eldest great-grandson of former Texas oil magnate H.L. Hunt. After the death of Mr. Hill's grandmother in 2007, Defendant became embroiled in several civil litigations in both Texas state and federal court against his father, Albert G. Hill, Jr., various other family members, and several trustees concerning Defendant's interest in certain family trusts with assets exceeding $1 billion.

2. On February 18, 2010, Judge Reed O'Connor of the United States District Court for the Northern District of Texas issued an order finding that Defendant's father, Mr. Hill, Jr., had submitted evidence to the federal court in bad faith and had lied in sworn testimony in connection with the dispute. [RR5, (DX1-p.11), 100.]. Judge O'Connor also found that Mike Lynn, Hill, Jr.'s attorney, had "far exceeded the bounds of advocacy, permissible or otherwise." [RR5, (DX1-p.12), 101].

3. Four days later, on February 22, 2010, on behalf of Hill, Jr., Mr. Lynn submitted a written complaint to Donna Strittmatter, head of the Specialized Crime Division of the Dallas County District Attorney's Office, alleging that his son, Defendant, had committed mortgage fraud in connection with a home equity loan he had obtained from OmniAmerican Bank. [RR5, (SX1-p.3), 8; RR4 75:25-76:9]. The crux of the allegation against Defendant was that he supposedly misrepresented his ownership interest in his primary residence, which was used as collateral for a loan. [RR4, 87:25, 88:5; RR5, (SX1-p.3), 8].

4. On June 11, 2010, less than four months after submitting the written complaint to Strittmatter, Mr. Lynn's law partner, Jeffrey Tillotson, contributed $10,000 to Dallas County District Attorney Craig Watkins's re-election campaign, [RR5, (DX2-p.102), 532]. Then on September 23, 2010, Tillotson pledged another $33,500, [RR5, (DX2-p.244), 674], and then contributed another $5,000 in November 2010. [RR5, (DX2-p.390), 820]. There is no evidence that either Mr. Tillotson or Mr. Lynn had ever contributed monies to Mr. Watkins before Mr. Lynn submitted the complaint against Defendant.

5. On or about April 2010, David Pickett, counsel for Mr. Hill, Jr.'s trust, submitted a second complaint against Defendant, which was substantially similar to the February 2010 complaint submitted by Mr. Lynn. [RR4, 138:18-21].

The District Attorney's Office apparently lost Mr. Pickett's submission. [RR4, 76:10-79:5].

6. In May 2010, Ms. Moore, then-First Assistant District Attorney, met with attorney Lisa Blue Baron ("Ms. Blue"). [RR4, 46:16-47:14; CR, 854]. Ms. Blue is a personal friend of Dallas County District Attorney Craig Watkins, and had recently served as Mr. Watkins's counsel on a pro bono basis. [CR, 855; RR5, (DX1-pp.60, 62, 64, 71-74), 149, 151, 153, 160-163]. At the time of the May 2010 meeting, Ms. Blue was one of a team of lawyers known as "BAM" who were representing Defendant in connection with, *inter alia*, the federal court civil litigation between Defendant and his father. [RR4, 46:25-47:3]. Ms. Blue represented Defendant from approximately November 2009 until at least July 2010, when a fee dispute arose between BAM and Defendant. [RR5, (DX1-p.48), 137; RR4, 209:14-16; Appendix, Ex. 5. [1]]. Ms. Blue met with Ms. Moore in May 2010 because she had learned that the D.A.'s office was likely investigating Defendant and his wife concerning the loan they received from OmniAmerican Bank. [RR4, 46:25-47:3; CR, 853-854].

7. During the May 2010 meeting, Ms. Blue presented Ms. Moore with a copy of Judge O'Connor's order finding that Mr. Hill, Jr. had committed perjury in

the federal district court, and described the bitter nature of the ongoing civil litigation between Defendant and Mr. Hill, Jr. [RR4, 46:12-47:14; RR5, (DX1-pp.7-13), 97-103]. During this meeting, Ms. Moore did not confirm the existence of a criminal investigation concerning Defendant. [RR4, 47:11-14, 52:14-23].

8. After meeting with Ms. Blue, Ms. Moore provided Ms. Stephanie Martin and Ms. Strittmatter with a copy of the federal court order and informed them that in light of the federal court's adverse finding, Mr. Hill, Jr. could not be used as a witness in the State's case. [RR4 48:4-22]. However, although the State was aware that the federal court had found Mr. Hill, Jr. to have committed perjury and had found that his attorney had exceeded the bounds of advocacy, the State relied extensively on materials submitted by Mr. Hill, Jr. and his attorney, and the State never issued grand jury subpoenas to Mr. Hill, Jr. or to his trust. [RR4, 103:7-21, 149:3-9].

9. Defendant and his opponents in the various civil litigations signed a settlement agreement in mid-May 2010. [Appendix, Ex. 4.]. In July 2010, a fee dispute arose between Defendant and BAM for $50 million. [Appendix, Ex. 5.].

10. On September 8, 2010, and November 10, 2010, Mr. Pickett contacted Ms. Martin, urging Ms. Martin to pursue indictments against the Defendant and his wife. [RR4, 145:1-146:16]. In his written communications, Mr. Pickett requested

---

[1] Pursuant to Tex. Rule Evid. 201(b), this Court takes judicial notice of

to meet with Ms. Martin's supervisor if she would not pursue indictments against the Hills. [RR4, 147:18-22].

11. On September 8, 2010, nearly seven months after Mr. Lynn submitted the complaint against Defendant, Ms. Martin spoke to Mr. Pickett. Ms. Martin's handwritten notes about this meeting reflect that she told him that the "bank really isn't interested in prosecuting," and that she "didn't see how she could prove his criminal case." [RR5, (DX8-p.1), 1084; RR4, 183:4-184:6]. Ms. Martin was reluctant to prosecute the case against Defendant because, among other reasons, OmniAmerican Bank, which was the "victim," had suffered no loss and did not want to prosecute. [RR4, 184:8-185:19, 201:4-9; RR5, (DX8-p.1), 1084]. However, Ms. Martin was directed by Ms. Moore after her September 8, 2010, discussion with Mr. Pickett to move forward with the investigation. [RR4, 186:12-187:13, 191:1-2; RR5, (DX8-p.1), 1084].

12. Before being impeached with her own notes, Ms. Martin testified that she had always believed that the case against Mr. Hill was strong and certain to be indicted from the moment it was first reported to the District Attorney's Office by Mr. Lynn. [RR4 149:3-150:5; 171:2-5.] As discussed below, the Court found this testimony not to be credible, including because it was inconsistent with Ms.

---

various records of other judicial proceedings that are relevant to this case.

Martin's contemporaneous notes, and because Ms. Martin admitted that she recently augmented her September 2010 notes. RR4 188:1-189:8.]

13. Shortly after Judge O'Connor entered a final judgment on the settlement agreement signed by Defendant and his opponents, on December 7, 2010, BAM filed a complaint in federal court against Defendant and his wife, Erin Hill seeking to recover a contingent fee on the settlement. [RR5, (DX1-p.50), 139]. BAM later quantified its fee claim against Defendant and his wife at more than $50 million. [RR5, (DX1-pp. 28-34, 319), 117-123, 408].

14. Ms. Blue's calendar reflects that she met with Mr. Watkins on January 7, 2011. [RR5, (DX4-pp.25-26), 1075-1076]. On January 12, 2011, Ms. Martin conducted a "pitch session" regarding the investigation against Defendant and Ms. Erin Hill. [RR4, 35:12-36:18, 120:20-25, 166:12-16]. The "pitch session" was a meeting to determine whether the Dallas District Attorney's Office would seek indictments against Defendant and his wife. Ms. Martin invited Mr. Watkins to attend the session because she expected that there would be substantial media attention if the State sought indictments against Defendant. [RR4, 35:12-15, 38:4-19, 80:18-81:1, 165:11-19].

15. Mr. Watkins, Ms. Moore, Ms. Strittmatter and Stephanie Martin all attended the January 12, 2011, pitch session. [RR4, 165:11-19]. According to Ms. Moore and Ms. Strittmater, Mr. Watkins was not actively involved in this meeting.

Neither witness remembers Mr. Watkins saying anything regarding the cases. However, Ms. Martin remembers that Mr. Watkins asked a number of questions, gave opinions about real estate title issues, suggested additional charges that his subordinates should consider bringing against Defendant and his wife, and actively participated during the pitch session. [RR4, 163:15-165:2]. Mr. Watkins was asking questions that were supportive of presenting the case to the grand jury, and that he supported indicting the Hills. [RR4, 163:3-7, 164:24-165:4]. Mr. Watkins had ultimate authority to determine whether Defendant and his wife would be indicted, and during the session, he approved moving forward with the indictments. [RR4, 191:13-18, 43:10-14]. Mr. Watkins was the final decision-maker, and the indictments would not have been returned without his approval. [RR4, 166:17-20, 191:13-18]. Ms. Martin's testimony cannot be reconciled with the testimony of Moore and Strittmatter. Both versions could not be true. Therefore, in order to determine the extent of Mr. Watkins' participation, it was necessary for the court to hear testimony from Mr. Watkins himself.

16. The same day as the "pitch session," Ms. Blue exchanged text messages with Mr. Watkins's assistant, Sharon Fuller, indicating that Ms. Blue intended to meet Mr. Watkins on Saturday, January 15, 2011. [RR5, (DX4-p.5), 1025].

17. On January 17, 2011, Ms. Blue, her BAM co-counsel, and Defendant entered into a written agreement to try their fee dispute in April 2011 before magistrate judge Renee Toliver. [RR5, (DX1-p.51), 141].

18. On January 20, 2011, three days after agreeing on a schedule for trying the fee dispute, Ms. Blue met Mr. Watkins for dinner that was paid for by Ms. Blue. [RR5, (DX3-p.28, DX4-pp.57-58), 1019, 1077-1078].

19. On January 21, 2011, the morning after meeting with Mr. Watkins for dinner, Ms. Blue called Mr. Watkins at 10:51 a.m. [RR5, (DX1-pp.297, 337), 386, 426]. Mr. Watkins returned Ms. Blue's call at 10:54 a.m. the same morning. [RR5, (DX1-pp.307-08, 337), 396-397, 426; RR4 212:9-213:15]. Ms. Blue testified during a deposition taken in the fee dispute with Defendant that this call took place at the offices of and in the presence of her BAM co-counsel Stephen Malouf, who was also adverse to Defendant and his wife in the fee dispute, and that during the call Mr. Watkins raised the topic of indicting Defendant and his wife, purportedly saying "there could be an indictment or are you still interested in the indictments."[2] [RR5, (DX1-pp.82-85), 171-174]. Ms. Blue's telephone records show that she called Mr. Watkins again at 11:13 a.m. on January 21, 2011,

---

[2] The State has stipulated to the admission into evidence of DX1-DX4, which include excerpts of Ms. Blue's deposition testimony from the fee dispute. [RR4, 29:7-31:25].

and that they had another conversation lasting six minutes. [RR5, (DX1-p.337), 426].

20. Ms. Blue called Mr. Watkins several times between March 3 and March 10, 2011. [RR5, (DX1-pp. 272-75, 337), 361-364, 426]. Ms. Blue's records indicate that she also met with Mr. Watkins on March 3, 2011 to take publicity photos in connection with a $100,000 donation Ms. Blue had made in his honor to SMU Law School in 2010. [RR5, (DX3-p.4, DX4-p.5), 995, 1025].

21. On March 9, 2011, Ms. Blue held a fundraiser for Mr. Watkins at her home. [RR5, (DX4-pp.59-60), 1079-1080]. The invitations for this event, which Ms. Blue sent via email on March 8, 2011, asked attendees to donate to the reelection campaign for Mr. Watkins because it would be a "tight race." [RR5, (DX4-pp.11-27), 1031-1047]. However, Mr. Watkins was reelected four months earlier on November 2, 2010. (Appendix, Ex. 7.). Therefore, during March 2011, Mr. Watkins was not running for any office. Ms. Blue personally contributed $5,000 to Mr. Watkins in connection with the March 9, 2011 event, and raised thousands more from other donors. [RR5, (DX2-p.442-460), 872-890].

22. On March 22, 2011, Ms. Blue was deposed in connection with her fee dispute with Defendant. [RR5, (DX1-p.68), 157]. After her deposition, in an attempt to reach Mr. Watkins, Ms. Blue placed a number of phone calls to Mr.

Watkins, and texted his assistant, Ms. Fuller. [RR5, (DX1-pp. 279-80, 337; DX4-p.5), 368-69, 426, 1025].

23. On March 24, 2011, Ms. Blue attended the deposition of one of Defendant's former attorneys in the fee dispute, and placed a call to the cell phone of Mr. Watkins during the lunch break of that deposition. [RR5, (DX1-pp.280, 301-02), 369, 390-391].

24. On March 29, 2011, Ms. Martin presented the case against Defendant and his wife to the grand jury. [RR5, (SX4-pp.1-4), 85-88; RR4, 167:21-22]. The same day that the indictments were presented to the grand jury, Ms. Blue sent Mr. Watkins's assistant Ms. Fuller an email stating that "Boss [Mr. Watkins] wanted to get together for a drink after work." [RR5, (DX3-p.32), 1012]. Ms. Blue also exchanged text messages with Ms. Fuller regarding Mr. Watkins's invitation to meet with Ms. Blue for drinks that night. [RR5, (DX4-pp.5-6), 1025-1026]. Due to a scheduling conflict, Mr. Watkins agreed through Ms. Fuller to meet Ms. Blue for dinner the next day. [RR5, (DX4-pp.5-6), 1025-1026; RR5, (DX3-p.32), 1012].

25. On the evening of March 30, 2011, Ms. Blue and Mr. Watkins met at Al Biernat's restaurant in Dallas. [RR5, (DX4-pp.5-6, 41-42), 1025-1026, 1081-1082]. Either during this dinner meeting with Mr. Watkins or shortly after it ended, Ms. Blue placed calls to both Mr. Malouf and Ms. Aldous, her BAM co-

plaintiffs in the fee dispute against Defendant and his wife. [RR5, (DX1-pp.282-183, 338), 371-372, 427]. Then, shortly after calling her BAM co-counsel, Ms. Blue and Mr. Watkins traded several short cellphone calls. [RR5, (DX1-pp.282-83, 338), 371-372, 427]. Ms. Blue admitted in her deposition testimony that Mr. Watkins raised the subject of the indictments of Defendant and his wife in at least one of the calls he placed to her that evening. [RR5, (DX1-pp.66-67), 175-176].

26. Ms. Blue admitted in her deposition testimony that Mr. Watkins called her and raised the subject of the indictments of Defendant and his wife at least one time after the call that is discussed above (i.e., the call on January 21, 2011). [RR5, (DX1-pp.66-67), 175-176]. Although Ms. Blue placed numerous calls to numbers associated with Mr. Watkins, Ms. Blue's phone records indicate that she received telephone calls from Mr. Watkins's cellphone on only two dates during the critical time frame: the morning of January 21, 2011, which call is discussed above, and the evening of March 30, 2011. [RR5, (DX1-pp.255, 282-283, 297, 337-338), 344, 371-72, 386, 426-427].

27. The State has suggested that Mr. Watkins may have discussed the impending indictments with Ms. Blue for the purposes of furthering the investigation into Defendant and his wife. [CR, 625-626 (State's Opp'n Br.); RR2 52:1-53:17]. This suggestion – that Mr. Watkins was eliciting information from Defendant's former attorney – is not supported by the record, and is also

inconsistent with the State's position that Mr. Watkins had no role in the investigation. [RR3, 24:5-20; RR4, 214:21-215:9]. It is further inconsistent with the fact that, according to Ms. Blue's deposition testimony and telephone records, Mr. Watkins continued to discuss indictments with Ms. Blue *after* the charges had already been presented to the grand jury.

28. The indictments against Defendant were made public on April 4, 2011, exactly two weeks before the scheduled commencement of the fee dispute trial. [RR5, (DX1-pp.52, 57-58), 141, 146-147; CR, 162.]. Four days later, on April 8, 2011, Ms. Blue contacted Mr. Watkins's wife and Mr. Watkins's assistant to deliver an additional $1,000 contribution to Mr. Watkins. [RR5, (DX4-p.6), 1026]. Ms. Blue thereafter had no further telephone communications with Mr. Watkins until the evening of April 27, 2011, when Ms. Blue called Mr. Watkins shortly after she testified at trial in the fee dispute against Defendant. [RR5, (DX1-p.338), 427].

29. Prior to seeking indictments against Defendant and his wife, the District Attorney's Office spoke to or interviewed Mr. Hill, Jr., his attorney, Mr. Lynn, and the general counsel at OmniAmerican Bank. The State did not conduct interviews with the loan officer at OmniAmerican Bank, the mortgage broker who presented the application to OmniAmerican Bank, the title company who

conducted the title search on the property at issue, Defendant, his wife, or counsel for Defendant and his wife. [RR4, 94:5-96:4, 141:3-17, 156:16-157:6].

30. After Defendant learned he was indicted, Defendant sought to stay his fee dispute with Ms. Blue and her BAM co-counsel until the criminal charges were resolved. [RR5, (DX1-pp.317-22), 406-411]. BAM objected to any delay, and the district court granted only a two-day continuance. [RR5, (DX1-p.321), 410]. The federal district court trial on BAM's claims against Defendant and his wife began on April 20, 2011, and concluded on April 28, 2011. In light of the criminal charges, and on the advice of his then-criminal counsel, Defendant and his wife exercised their Fifth Amendment privilege not to testify at the trial. [RR5, (DX1-pp.326-27, 332), 415-416, 421].

31. In September 2011, after the fee dispute had been tried but before a judgment had been entered, Dallas County, at the recommendation of the District Attorney's office, hired Ms. Blue and her BAM co-counsel Mr. Malouf to represent Dallas County in a significant contingent fee matter involving alleged improprieties in connection with mortgages recorded in Dallas County. [RR5, (SX3-pp.1-6), 78-83; RR4 72:5-75:10]. At Ms. Blue's suggestion, Mr. Malouf asked Ms. Moore, who by this time had left the District Attorney's Office, to join Ms. Blue and himself as co-counsel in this matter, and Ms. Moore agreed. [RR4, 66:18-69:15].

32. In January 2012, the federal district court awarded BAM a total of $21,942,961.00 in attorney's fees, of which Ms. Blue is entitled to one-third, or approximately $7.3 million. [RR5, (DX1-pp.17, 39), 106, 128].

33. The defense has asserted in their pleadings, and the State has not denied, that on October 12, 2012, counsel for Defendant and his wife met with Assistant District Attorney Deborah Smith to discuss the indictments. During that meeting, Ms. Smith apologized to counsel for Defendant and his wife for the manner in which the cases had been handled by her office, and indicated that she was conducting further investigation with the expectation that all of the charges against Erin Hill, and some or all of the charges against Defendant, would likely be dismissed. Later that same day, the District Attorney's Office moved to dismiss all charges against Erin Hill. [RR4, 216:25-218:23; Appendix, Ex. 1-3 (Motions to Dismiss)[3]]. Ms. Smith was soon thereafter removed from the case by the District Attorney's Office, and the indictments against Defendant were reassigned to Ms. Strittmatter. [CR, 487].

B. Defendant Moves to Dismiss the Indictments Based Upon Prosecutorial Misconduct

---

[3] In accordance with this Court's finding on the record [RR4, 217:9-10], and pursuant to Texas Rule of Evidence 201(c) and *Sierad v. Barnett*, 164 S.W.3d 471, 481 (Tex. App. Dallas 2005, *no pet.*), this Court hereby takes judicial notice of the Motions dated October 12, 2012 signed by the 194th Judicial District Court of Dallas, dismissing the Indictments in Cause Numbers F-1100184, F-1100185, and F-1100186 against Erin Nance Hill.

34. On November 16, 2012, Defendant filed a Motion to Quash and Dismiss Indictments Due to Prosecutorial Misconduct. (CR, 31-488). Defendant alleged that his constitutional rights, including his due process rights and equal protection rights, had been violated because he had been deprived of his right to a disinterested prosecutor, he had been prosecuted vindictively, and he had been prosecuted on a selective basis. (CR, 52-63). The central allegation is that Mr. Watkins had improperly approved seeking the indictments as an accommodation to Ms. Blue.

35. On January 22, 2013, Defendant served subpoenas on Mr. Watkins and other members of the Dallas District Attorney's Office, seeking to compel testimony and the production of documents on February 1, 2013. Among other things, the subpoenas requested evidence of communications between Mr. Watkins and Ms. Blue relating to the Hills. In response, the State filed a series of motions to quash and for a protective order, arguing, *inter alia*, that the District Attorney had a privilege under the work product doctrine not to provide the information sought by Defendant's subpoenas. [CR, 523-573].

36. Having considered Defendant's initial submission, which included deposition testimony from Ms. Blue and Mr. Malouf, Ms. Blue's telephone records, emails, campaign finance records, and other materials which collectively provide a strong circumstantial basis for the conclusion that Mr. Watkins was

improperly influenced by Ms. Blue with respect to the decision to approve the indictments of the Hills, the Court ruled that Defendant was entitled to an evidentiary hearing concerning whether Mr. Watkins was improperly influenced by Ms. Blue with respect to the decision to approve the indictments of Defendant and his wife. The Court found, among other things, that Defendant was entitled to examine both Ms. Blue and Mr. Watkins about their discussions with each other concerning the indictments. [RR2, 28:17-29:2, 41:6-23].

37. On February 12, 2013, Ms. Blue filed an affidavit in which she testified about certain communications with Mr. Watkins concerning the indictments, and in which she asserted that she had never "even intimated" to Mr. Watkins that she wanted Defendant and his wife to be investigated or indicted. [CR, 853-856]. On February 14, 2013, Defendant called Ms. Blue to the witness stand. Notwithstanding that she had submitted an affidavit just two days earlier that addressed the very topics on which she was to be examined, Ms. Blue refused to testify after invoking her Fifth Amendment right not to incriminate herself. [RR2, 46:13-48:25]. Ms. Blue specifically invoked her privilege against self-incrimination in response to the single substantive question she was asked on the record: "[D]id you discuss potential indictments against Albert and [Erin] Hill with Dallas County District Attorney Craig Watkins in March of 2011?" [RR2, 48:17-

25]. Ms. Blue also indicated that she would refuse to answer any other substantive questions. [RR2, 48:24-25].

38. On February 14, 2013, attorneys for Mr. Watkins announced that Mr. Watkins would not testify about his conversations with Ms. Blue because such conversations were privileged "work product." [RR2, 51:7-54:3, 56:19-58:13]. Mr. Watkins also appeared to claim law enforcement and executive privileges against testifying. (CR, 554-557). After the Court overruled the State's objections, attorneys for Mr. Watkins next claimed that, although he was at work in his office in the same building as this Court, Mr. Watkins was too ill to testify. [RR2, 66:25-67:19]. The Court granted the State a continuance of the hearing, rescheduling it to March 7, 2013. [RR2, 71:9-72:14].

39. On March 7, 2013, the Court held an evidentiary hearing. At the outset of the hearing, Ms. Blue's counsel represented to the Court that Ms. Blue would once again refuse to testify in response to substantive questions based upon her Fifth Amendment rights. Accordingly, Ms. Blue was excused. [RR4 7:11-8:14].

40. Defendant's counsel then called Mr. Watkins to testify. Mr. Watkins was asked the following question: "Mr. Watkins, before the indictments of the Hills were handed down, you had at least one or more phone calls with Lisa Blue concerning the Hills, correct?" Mr. Watkins answered: "Based on the advice of

my counsel and of the advice of my staff with the District Attorney's Office, I am refusing to answer any questions that you may pose be – because of my right as an attorney to have the privilege and to protect my work product." [RR4, 15:7-14].

41. Mr. Watkins was next asked: "You said to Ms. Blue, words to the effect of, 'There could be an indictment of Mr. Hill, or both the Hills. Are you still interested in the indictments?' Correct, sir?" Mr. Watkins answered: "Again, I will assert the privileges just stated by my attorney and just stated by me on the record here on the witness stand." [RR4, 15:16-22].

42. This Court overruled Mr. Watkins's assertions and directed him to answer these questions. [RR4, 15:23-17:9]. Mr. Watkins responded: "Judge, I'm gonna continue to assert the privilege." [RR4, 17:10-11].

43. The Court found Mr. Watkins in contempt. [RR4 17:12-18].

44. Defendant's counsel then called to testify Ms. Strittmatter and Ms. Martin, both of whom are currently employed as prosecutors by the Dallas County District Attorney's Office, as well as former First Assistant District Attorney Ms. Moore. Prior to the hearing, the State submitted affidavits from Ms. Strittmatter and Ms. Martin that revealed internal discussions within the District Attorney's Office regarding the investigation and decision to indictment Defendant and his wife. [CR, 773-778]. In addition, Ms. Moore had recently submitted a declaration in the federal fee dispute that likewise addressed the same matters revealed by Ms.

Strittmatter and Ms. Martin regarding internal discussions within the District Attorney's Office leading up to the indictments. [RR4, 40:15-18; 12:7-13:18; Appendix, Ex. 6].

45. The State did not raise any privilege or work product objections during the testimony of Ms. Strittmatter, Ms. Martin, and Ms. Moore. Nor did the State object to the scope of the questions asked. The State allowed each of these witnesses to testify extensively regarding the State's investigation into Defendant and his wife, the January 12, 2011 "pitch session," and the State's decision to indict Defendant and his wife. The State also elicited testimony concerning the events at issue and introduced into evidence internal documents, including a PowerPoint presentation that had been used at the "pitch session." [RR5, (SX2-pp.1-9), 68-76]. Therefore, this Court finds that during the hearing, the State did not object to the testimony of any of these witnesses on any grounds, including attorney-client communication, work-product privilege, law enforcement privilege, or executive privilege.

46. The Court found that the State's submission of affidavits signed by Ms. Strittmatter and Ms. Martin, (RR2, 56:12-58:12), and the State's failure to raise any objections during the testimony of Ms. Strittmatter, Ms. Martin, and Ms. Moore, constitutes a waiver of any purported privilege that might otherwise have existed concerning the "pitch session," the decision to indict Defendant and his

wife, and Mr. Watkins's communications with Ms. Blue, and further underscores that Mr. Watkins had no legitimate basis to refuse to testify after the Court overruled his objections.

47. The Court further found that it was appropriate to draw an adverse inference against the State based upon Ms. Blue's refusal to testify. [RR4, 196:13-23]. On February 12, 2013, Ms. Blue filed an affidavit that purported to testify about her communications with Mr. Watkins in a manner favorable to the State, then refused to permit Defendant to cross-examine her on the same issues just two days later. The Court thus draws an adverse inference based upon her refusal to testify.

48. Moreover, given: (1) the admittedly close relationship between Ms. Blue and Mr. Watkins, (2) the fact that she has served as his personal attorney, (3) the fact that she is currently representing the Dallas County Clerk in a significant litigation matter at Mr. Watkins's request, (4) the fact that Ms. Blue was in close and frequent communication with Mr. Watkins around the time of the indictments, (5) the fact that Ms. Blue not only personally contributed substantial sums to and in honor of Mr. Watkins, but also hosted a fundraiser for him at her house just weeks before the indictments, (6) the fact that the indictments were obtained shortly before the commencement of a $50+ million fee trial between Ms. Blue and Defendant, and (8) the fact that the subject matter about which Ms. Blue refused to

testify concerned her communications with Mr. Watkins about the indictments, the Court finds that Ms. Blue and Mr. Watkins, the two persons who would have known the most about what occurred, refused to testify, (RR4, 197), and it thus appropriate to draw an adverse inference against the State.

49. The Court finds that Ms. Moore's testimony at the March 7, 2013 hearing was largely immaterial, and also lacked sufficient credibility to support any of the State's central contentions. In particular, Ms. Moore's close relationships with Ms. Blue and Mr. Watkins, and her ongoing financial relationship with Ms. Blue in connection with the contingent fee matter discussed above, cause the Court to give little weight to her testimony. [RR4, 191:3-4].

50. Ms. Martin's testimony at the March 7, 2013 hearing was highly material, but the Court found that her testimony in favor of the State was not credible after she was impeached with her own contemporaneous notes, and because she admitted that she had recently attempted to supplement those notes. [RR4, 216:13-24, 188:1-189:19].

51. After hearing testimony from Ms. Moore, Ms. Strittmatter, and Ms. Martin, which underscored Mr. Watkins's central importance in making the decision to pursue indictments against Defendant and his wife, the Court gave Mr. Watkins yet another opportunity to testify. Mr. Watkins again refused to do so. [RR4, 193:7-194:3, 195:11-20].

52. The Court finds that it is appropriate to draw an adverse inference against the State because of Mr. Watkins's refusal to testify concerning his discussions with Ms. Blue about the indictments. An adverse inference is particularly appropriate in light of the fact that not only were Mr. Watkins's privilege objections concerning his discussions with Ms. Blue about the indictments lacking in merit, but the State waived any purported privilege and work product objections concerning Mr. Watkins's discussions with Ms. Blue about the indictments by submitting affidavits signed by Ms. Strittmatter and Ms. Martin regarding the decision to indict Defendant and his wife, and by permitting Ms. Strittmatter, Ms. Martin, and Ms. Moore to testify extensively about the State's investigation, deliberations, and thought processes concerning the indictments of Defendant and his wife, including Mr. Watkins's participation in same.

53. The Court, having reviewed all of the evidence, finds that because of the failure of Mr. Watkins to testify at the hearing on February 14, 2013 and March 7, 2013, Defendant has been denied his right to have a meaningful hearing on his Motion to Dismiss. On this basis, this Court finds that the cases should be dismissed.

II. CONCLUSIONS OF LAW

A. Defendant Established that he Was Entitled To An Evidentiary Hearing

54. Claims by a defendant of prosecutorial misconduct "are not defenses on the merits to the criminal charge but independent assertions that the prosecutor has brought the charge for reasons that the Constitution prohibits." *Ex parte Quintana*, 346 S.W.3d 681, 685 (Tex. App. El Paso 2009, *pet. refused*) (*citing United States v. Armstrong*, 517 U.S. 456, 463 (1996)). Although prosecutors generally have broad discretion in enforcing criminal laws, "selective prosecution does limit a prosecutor's otherwise broad discretion in determining what crimes to prosecute and how." *Id.* Thus, courts may hold evidentiary hearings to investigate claims of prosecutorial misconduct, and courts may require prosecutors to testify at such hearings. *State v. Terrazas*, 970 S.W.2d 157, 160 (Tex. App. El Paso 1998), *aff'd*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (prosecutor testified at evidentiary hearing on motion to dismiss regarding alleged conflict of interest); *State v. Frye,* 897 S.W.2d 324, 331 (Tex. Crim. App. 1995) (prosecutor testified at evidentiary hearing on motion to dismiss based on prosecutorial misconduct).

55. Courts may hold evidentiary hearings to investigate alleged conflicts of interest on the part of the prosecutor. *Terrazas*, 970 S.W.2d at 160, *aff'd*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (chief of the El Paso D.A.'s Office's

screening section testified at evidentiary hearing that compensation to the office did not affect decision to prosecute welfare fraud cases); *Landers v. State*, 256 S.W.3d 295, 300-301 (Tex. Crim. App. 2008) (district attorney testified at an evidentiary hearing on disqualification based on an alleged conflict of interest); *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals at Texarkana*, 236 S.W.3d 207, 209 (Tex. Crim. App. 2007) (same); *see also Eleby v. State*, 172 S.W.3d 247, 249 (Tex. App. Beaumont 2005, *pet. ref'd*) (same)

56. A constitutional claim of prosecutorial vindictiveness may be established in either of two distinct ways: (1) proof of circumstances that pose a "realistic likelihood" of such misconduct sufficient to raise a "presumption of prosecutorial vindictiveness," which the State must rebut or face dismissal of the charges; or (2) proof of "actual vindictiveness"- that is, direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right. *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (*internal citations omitted*).

57. And to support a defense of selective or discriminatory prosecution, a defendant must make a prima facie showing that: (1) although others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) the government's discriminatory selection of him has been

invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his constitutional rights. *Hall v. State*, 137 S.W.3d 847, 855 (Tex. App. Houston [1st Dist.] 2004, *pet. ref'd*) (*citing Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. [Panel Op.] 1980)).

58. The Court concludes that the evidence presented by Defendant in support of his request for an evidentiary hearing, which included, among other things, (1) deposition testimony by Ms. Blue and her colleague Mr. Malouf; (2) Ms. Blue's telephone records; (3) Mr. Watkins's campaign finance records; and (4) emails and other documents which collectively present a strong circumstantial case that Defendant's rights were violated more than satisfied his burden, thereby entitling Defendant to an evidentiary hearing concerning his claims of prosecutorial misconduct.

59. The Court also concludes that in connection with this hearing, the Defendant was entitled to the use of compulsory process, including subpoenas for documents and testimony, in order to present evidence material to the issues pending before the Court. Contrary to the State's argument, the use of such compulsory process does not constitute "discovery" pursuant to Art. 39.14 of the Texas Code of Criminal Procedure. Indeed, the evidence the Defendant sought to present via subpoena did not relate to the merits of the underlying criminal case, but rather to the Defendant's allegations of prosecutorial misconduct.

B. The Court Draws An Adverse Inference Against The State From Ms. Blue's Invocation Of The Fifth Amendment.

60. An adverse inference may not be drawn from a *defendant's* proper invocation of a privilege because in a criminal case "the stakes are higher and the State's sole interest is to convict." *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976). However, the danger of unfair prejudice is not the same when it is the defense, rather than the State, that seeks to draw an inference from a witness's invocation of privilege.

61. Adverse inferences are drawn in civil litigation. *See Webb v. Maldonado*, 331 S.W.3d 879, 883 (Tex. App. Dallas 2011, *pet. denied*) ("In a civil case, a fact finder may draw negative inferences from a party's assertion of the privilege against self-incrimination." (*citing* Tex. Rule Evid. 513(c)); *Wil-Roye Inv. Co. II v. Washington Mut. Bank, F.A.*, 142 S.W.3d 393, 406-407 (Tex. App. El Paso 2004, *no pet.*) (adverse inference may be drawn against a party based on a non-party's invocation of privilege in a civil case).

62. The Court concludes that it is appropriate to draw an adverse inference against the State because of Mr. Watkins' and Ms. Blue's refusal to testify. In view of: (1) Ms. Blue's close relationship with Mr. Watkins, (2) the evidence that Ms. Blue contributed substantial sums to Mr. Watkins and hosted a fundraiser for him at her home shortly before the indictments were returned, (3) the fact that she and her BAM co-counsel stood to directly benefit from the

indictments, and (4) the particular subject matter of the questions that she refused to answer, the Court concludes that Ms. Blue and Mr. Watkins were effectively agents or co-conspirators of each other, and that it is appropriate to draw an adverse inference against the State because of Ms. Blue's refusal to testify. *See Wil-Roye Inv. Co. v. Wash. Mut. Bank, F.A.*, 142 S.W.3d 393, 405-407 (Tex. App. El Paso 2004) (holding that it is appropriate under Texas law to consider the fact that an agent or co-conspirator has invoked Fifth Amendment "at least where the questions substantially relate to a party's claim or defense"); *FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969, 977-978 (5th Cir. 1995) (permitting adverse inference to be drawn against party based upon nonparty's invocation of Fifth Amendment rights).

C. Mr. Watkins's Conversations With Ms. Blue Are Not Privileged And Any Purported Privilege Has Been Waived By The State

63. Mr. Watkins asserted that *all* of his communications with Ms. Blue are protected from disclosure on the basis of various privileges, primarily the work product privilege. "To make a prima facie showing of the applicability of a privilege, a party must plead the particular privilege, produce evidence to support the privilege through affidavits or testimony, and produce the documents for an *in camera* inspection, if the trial court determines review is necessary." *In re ExxonMobil Corp.*, 97 S.W.3d 353, 357 (Tex. App. Houston [14th Dist.] 2003, *orig. proceeding*). "The burden to establish the privilege is on the party seeking to

shield information from discovery," and the party "has the obligation to prove, by competent evidence, that the privilege applies to the information sought." *Arlington Mem'l Hosp. Found., Inc. v. Barton*, 952 S.W.2d 927, 929 (Tex. App. Fort Worth 1997, *orig. proceeding*).

64. Likewise, where a district attorney seeks to avoid disclosure of particular evidence by claiming that the evidence is the State's work product, the State must provide specific explanation or argument as to why particular items are not discoverable. *See In re Jennifer Tharp*, No. 03-12-00398-CV, 2012 Tex. App. LEXIS 6676, at *4-5 (Tex. App. Austin, Aug. 9, 2012, *orig. proceeding*) (denying D.A.'s petition for writ of mandamus on grounds of work product protection, where D.A. "[made] only a blanket work-product assertion"); *see also State v. Terrazas*, 970 S.W.2d at 160 (chief of the El Paso D.A.'s Office's screening section testified that compensation to the office did not affect decision to prosecute welfare fraud cases); *See, e.g., In re State*, No. 13-10-00264-CR, 2010 Tex. App. LEXIS 3808, *2 (Tex. App. Corpus Christi, May 17, 2010, *orig. proceeding*) (*not designated for publication*) (trial court ordered the Cameron County District Attorney to testify regarding a "blacklist" policy that the D.A.'s office allegedly maintained).

65. Further, although there is no general right to discovery in a criminal case beyond exculpatory evidence that the State is constitutionally obliged to

disclose, whether certain evidence is discoverable "is left to the discretion of the trial judge." *McBride v. State*, 838 S.W.2d 248, 250 (Tex. Crim. App. 1992).

66. Mr. Watkins refused to answer the following two questions posed to him: (1) "Mr. Watkins, before the indictments of the Hills were handed down, you had at least one or more phone calls with Lisa Blue concerning the Hills, correct?"; and (2) "You said to Ms. Blue, words to the effect of, There could be an indictment of Mr. Hill, or both the Hills. Are you still interested in the indictments? Correct, sir?" Thereafter, Mr. Watkins refused to answer any further questions, again on the basis of alleged "privilege," even after the Court gave him a further opportunity after overruling his objections and finding him in contempt. [RR4 14:1-17:11, 191:19-193:13, 195:13-20.]

67. This Court concludes that the State, as the proponent of the privilege, has not carried its burden of showing that Mr. Watkins's answers to the questions posed, or to other questions regarding his communications with Ms. Blue – a third party to the District Attorney's investigation who was not identified as a witness by the prosecutor running the investigation – are either privileged or work product.

68. Moreover, Texas Rule of Evidence 511(1) provides that "[a] person upon whom [Texas rules] confer a privilege against disclosure waives the privilege if . . . the person . . . voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged."

See Tex. Rule Evid. 511(1); *see also Jones v. State*, 181 S.W.3d 875, 878 (Tex. App. Dallas 2006, *pet. ref'd*).

69. The Court concludes that the State may not selectively waive its privilege as to the decision to indict in order to permit certain prosecutors who have no knowledge of communications between Mr. Watkins and Ms. Blue, but not Mr. Watkins, to testify about that decision. *Alford v. Bryant*, 137 S.W.3d 916, 921 (Tex. App. Dallas 2004) ("When a party uses a privilege as a sword rather than a shield, she waives the privilege.").

70. The Court also concludes that the State waived any purported privilege or work product objections concerning Mr. Watkins's discussions with Ms. Blue about the indictments by: (1) voluntarily submitting affidavits signed by Ms. Strittmatter and Ms. Martin without objection prior to the hearing on March 7, 2013 regarding the decision to indict the Hills; and (2) by Ms. Strittmatter, Ms. Martin, and Ms. Moore extensively testifying on March 7, 2013 about the decisions to indict, testimony that went far beyond the limited nature of the hearing without objection.

71. The Court further concludes that it is appropriate to draw an adverse inference against the State because of Mr. Watkins's refusal to testify after the Court overruled his objections. Mr. Watkins's contention that his discussions with Defendant's former attorney, Ms. Blue, about potential indictments against

Defendant and his wife are somehow privileged is without merit. Mr. Watkins chose not to assert his Fifth Amendment privilege at the hearing, but rather claimed that he was refusing to testify based on the grounds of attorney-client privilege and work product.

72. Further, as explained above, these meritless objections are moot because the State allowed Mr. Watkins's subordinates to testify extensively (both in affidavits and then again at the March 7, 2013 hearing) about the State's purported reasons for indicting Defendant and his wife. This Court therefore concludes that because the State lacked any valid claim of privilege, Mr. Watkins's refusal to testify about his communications with Ms. Blue strongly supports the inference that Defendant's claims of misconduct are true.

D. Defendant Made A Prima Facie Showing That The District Attorney's Office Violated His Constitutional Rights To Due Process Of Law And Equal Protection, And The State Failed To Rebut That Showing

i. Selective and Discriminatory Prosecution

73. To support a defense of selective or discriminatory prosecution, a defendant must make a prima facie showing that: (1) although others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations, or the

desire to prevent his constitutional rights. *Hall v. State*, 137 S.W.3d 847, 855 (Tex. App. Houston [1st Dist.] 2004, *pet. ref'd*) (*citing Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. [Panel Op.] 1980)); *Garcia*, 172 S.W.3d at 273-274. Such a showing can be made by showing that the defendant was treated differently than others because of "improper considerations" such as the "desire to prevent the exercise of a constitutional right." *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir. 2000) (citing *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999)); *see also Samford v. Samford*, No. 6:08-cv-42, 2010 WL 582498, at *2 (E.D. Tex. Feb. 11, 2010) ("Plaintiff's selective enforcement claim—which the courts treat as a 'class of one' equal protection claim—requires a showing that 'an illegitimate animus or ill-will motivated her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment.'" (citation omitted)).

74. As to the first prong, rather than a rigid rule that "comparators must be *prima facie* identical in all relevant aspects" to be similarly situated, "the inquiry is case-specific and requires [courts] to consider the full variety of factors that an objectively reasonable . . . decision-maker would have found relevant in making the challenged decision." *Lindquist v. City of Pasadena*, 669 F.3d 225, 233-34 (5th Cir. 2012) (internal quotation marks omitted). As to the second prong, a prosecutor's personal vindictiveness constitutes an invidious basis for prosecution.

See Bryan, 213 F.3d at 276-277; *Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006).

75. This Court concludes that Defendant has made a *prima facie* case that Defendant was singled out for prosecution for an improper purpose. As discussed above, the evidence shows: (1) that leading up to the indictments, Mr. Watkins was in close and frequent contact with Ms. Blue, received campaign contributions and other favors from her shortly before the indictments were returned, and discussed the indictments with her on at least two occasions before they were obtained; (2) that the indictments were obtained shortly before Ms. Blue's $50+ million fee trial against Defendant; and (3) that the District Attorney's Office had internal doubts about bringing charges against Defendant and his wife, and conducted a limited investigation before proceeding with charges. This, along with the other evidence in this case, including Mr. Watkins's refusal to testify at the evidentiary hearing on Defendant's motion, strongly supports this Court's conclusion that Mr. Watkins approved the indictments against the Hills in order to assist Ms. Blue in BAM's fee dispute against Defendant and his wife.

76. Thus, the Court concludes that Defendant has satisfied both prongs of the standard for making out a prima facie case that he was singled out for prosecution for an improper purpose.

77. Once the defendant makes a *prima facie* showing, "the burden shifts to the State to justify the discriminatory treatment." *Quintana*, 346 S.W.3d at 685; The prosecutor's explanation must be 'clear and reasonably specific,' must contain 'legitimate reasons,' and those reasons must be related to the case being tried at the moment." *See Williams v. State*, 804 S.W.2d 95, 106 (Tex. Crim. App. 1991, *en banc*).

78. The Court concludes that the State has failed to provide a credible, neutral explanation for the State's decision to prosecute that is untainted by Mr. Watkins's involvement or Ms. Blue's influence. *Id.*, at 106 ("[A] finding of intentional discrimination is a finding of a fact," that "largely will turn on evaluation of credibility.") To the contrary, both Mr. Watkins and Ms. Blue refused to testify at the evidentiary hearing on Defendant's motion. Moreover, the Court made adverse credibility findings with respect to the State's key witness, Ms. Martin. As to Ms. Moore and Ms. Strittmatter's testimony, it was largely immaterial to the central issues presented by Defendant's motion. [RR4, 107:9-24]. The Court therefore concludes that the State has failed to rebut Defendant's showing of selective prosecution.

ii. Vindictive Prosecution

79. A constitutional claim of prosecutorial vindictiveness may be established in either of two distinct ways: (1) proof of circumstances that pose a

"realistic likelihood" of such misconduct sufficient to raise a "presumption of prosecutorial vindictiveness," which the State must rebut or face dismissal of the charges; or (2) proof of "actual vindictiveness," that is, direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right. *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (*internal citations omitted*).

80. The Court, having reviewed all of the evidence, concludes that because of the failure of Mr. Watkins to testify at the hearing on February 14, 2013 and March 7, 2013, Defendant has been denied his right to have a meaningful hearing on the issue of vindictive prosecution. On this basis, this Court concludes that the cases should be dismissed.

iii. Deprivation Of Defendant's Right To A Disinterested Prosecutor

81. "[T]he due process rights of a criminal defendant are violated when a prosecuting attorney who has a conflict of interest relevant to the defendant's case," such as a personal interest or "a financial stake in the outcome of a prosecution," prosecutes the defendant. *See In re Guerra*, 235 S.W.3d 392, 429-431 (Tex. App. Corpus Christi 2007, *orig. proceeding*) (a violation occurs where the "potential for misconduct is deemed intolerable"). To demonstrate a due process violation, a defendant must show that the prosecutor's conflict has interfered or there is a substantial threat that it could interfere with the fairness of

the proceedings. *Guerra*, 235 S.W.3d at 430-31; *State v. Terrazas*, 962 S.W.2d 38, 41-42 (Tex. Crim. App. 1998) ("substantial threat" of prejudice is sufficient); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 n. 18 (1987) ("actual conflict" exists where the "potential for misconduct is deemed intolerable," regardless of "whether that conflict resulted in any actual misconduct").

82. The Court, having reviewed all of the evidence, concludes that because of the failure of Mr. Watkins to testify at the hearing on February 14, 2013 and March 7, 2013, Defendant has been denied his right to have a meaningful hearing on the issue of whether he was being prosecuted by a disinterested prosecutor. On this basis, this Court concludes that the cases should be dismissed.

E. The Indictments Are Quashed and Dismissed

83. It is well-established that "a trial court may dismiss a charging instrument under certain circumstances." *State v. Mungia*, 119 S.W.3d 814, 816 (Tex. Crim. App. 2003). A trial court is authorized to dismiss a case without the consent of the prosecutor when authorized by statute, common law, or constitution. *Id.*

84. Texas courts have recognized that a trial court has the power to dismiss a case without the State's consent in a variety of circumstances: for

example, when "a defendant has been denied a right to a speedy trial, when there is a defect in the charging instrument . . . when a defendant is detained and no charging instrument is properly presented," and when a defendant's Sixth Amendment right to counsel has been violated and the trial court is unable to identify and neutralize the taint by any other means. *State v. Mungia*, *Id.* at 816-817. Other constitutional violations may also support a trial court's dismissal of a case. *Id.* at 817 ("[A]lthough a particular constitutional violation has not yet been recognized as a basis for a trial court to dismiss a charging instrument, this does not preclude a trial court from having authority to dismiss on that ground.") The trial court's authority to dismiss an indictment without the consent of the State extends to cases where the defendant's constitutional rights were violated and dismissal of the indictment is necessary to "neutralize the taint of the unconstitutional action." *Id.*; *see also Terrazas*, 962 S.W.2d at 41 ("[D]ismissal may be proper when a defendant suffers demonstrable prejudice, *or a substantial threat thereof*, and where the trial court is unable to identify and neutralize the taint by other means." (emphasis added)).

85. The Court, having reviewed all of the evidence, concludes that because of the failure of Mr. Watkins to testify at the hearing on February 14, 2013 and March 7, 2013, Defendant has been denied his right to have a meaningful hearing on the issues presented in Defendant's *Motion to Quash and Dismiss the*

Indictments Due to Prosecutorial Misconduct. On this basis, this Court concludes that the cases should be dismissed.

Signed on July 2, 2013.

JUDGE PRESIDING

517 U.S. 456 (1996)
116 S.Ct. 1480, 134 L.Ed.2d 687, 64 USLW 4305
UNITED STATES
v.
ARMSTRONG et al.
Case No. 95-157
United States Supreme Court
May 13, 1996

Argued February 26, 1996

CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

In response to their indictment on "crack" cocaine and other federal charges, respondents filed a motion for discovery or for dismissal, alleging that they were selected for prosecution because they are black. The District Court granted the motion over the Government's argument, among others, that there was no evidence or allegation that it had failed to prosecute nonblack defendants. When the Government indicated it would not comply with the discovery order, the court dismissed the case. The en banc Ninth Circuit affirmed, holding that the proof requirements for a selective-prosecution claim do not compel a defendant to demonstrate that the Government has failed to prosecute others who are similarly situated.

Held:

For a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races. Pp. 461-471.

(a) Contrary to respondents' contention, Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases, does not support the result reached by the Ninth Circuit in this case. Rule 16(a)(1)(C)—which, *inter alia,* requires the Government to permit discovery of documents that are "material to the preparation of the . . . defense" or "intended for use by the government as evidence in chief"— applies only to the preparation of the "defense" against the Government's case in chief, not to the preparation of selective-prosecution claims. This reading creates a perceptible symmetry between the types of documents referred to in the Rule. Moreover, its correctness is established beyond peradventure by Rule 16(a)(2), which, as relevant here, exempts from discovery the work product of Government attorneys and agents made in connection with the case's investigation. Respondents' construction of "defense" as including selective-prosecution claims is implausible: It creates the anomaly of a defendant's being able to examine all Government work product under Rule 16(a)(1)(C), except that which is most pertinent, the work product in connection with his own case, under Rule 16(a)(2). Pp. 461-463.

(b) Under the equal protection component of the Fifth Amendment's Due Process Clause, the decision whether to prosecute may not be based

on an arbitrary classification such as race or religion. *Oyler v. Boles,* 368 U.S. 448, 456. In order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. *Ibid.* To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. *Ah Sin v. Wittman,* 198 U.S. 500. *Batson v. Kentucky,* 476 U.S. 79, and *Hunter v. Underwood,* 471 U.S. 222, distinguished. Although *Ah Sin* involved federal review of a state conviction, a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the core powers of the Executive Branch of the Federal Government, the power to prosecute. Discovery imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. Assuming that discovery is available on an appropriate showing in aid of a selective-prosecution claim, see *Wade v. United States,* 504 U.S. 181, the justifications for a rigorous standard of proof for the elements of such a case thus require a correspondingly rigorous standard for discovery in aid of it. Thus, in order to establish entitlement to such discovery, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. In this case, respondents have not met this required threshold. Pp. 463-471.
48 F.3d 1508, reversed and remanded.

Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg, JJ., joined, and in which Breyer, J., joined in part. Souter, J., *post,* p. 471, and Ginsburg, J., *post,* p. 471, filed concurring opinions. Breyer, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 471. Stevens, J., filed a dissenting opinion, *post,* p. 476.

Solicitor General Days argued the cause for the United States. With him on the briefs were *Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben, Irving L. Gornstein,* and *Kathleen A. Felton.*

Barbara E. O'Connor, by appointment of the Court, 516 U.S. 1007, argued the cause for respondents. With her on the brief for respondents Martin et al. were *MariaE. Stratton, Timothy C. Lannen,* by appointment of the Court, 516 U.S. 1007, *David Dudley, Bernard J. Rosen,* and
Page 458
Eric Schnapper. Joseph F. Walsh, by appointment of the Court, 516 U.S. 1007, filed a brief for respondent Rozelle.[*]

Chief Justice Rehnquist delivered the opinion of the Court.

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U.S.C. §§ 841 and 846 (1988 ed. and Supp. IV), and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics

Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found
Page 459
more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a "Paralegal Specialist," employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.[1]

The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation "that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them." App.150. The District Court granted the motion. It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and(4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses. *Id.,* at 161-162.

The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits
Page 460
and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because
"there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations." *Id.,* at 81.
The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." J. Featherly & E. Hill, Crack Cocaine Overview 1989; App. 103.

In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of caucasian users and dealers to minority users and dealers." *Id.,* at 138. Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, *id.,* at 141, and a newspaper article reporting that federal "crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine,

Page 461

and almost every single one of them is black," Newton, Harsher Crack Sentences Criticized as Racial Inequity, Los Angeles Times, Nov. 23, 1992, p. 1; App. 208-210.

The District Court denied the motion for reconsideration. When the Government indicated it would not comply with the court's discovery order, the court dismissed the case.[2]

A divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, holding that, because of the proof requirements for a selective-prosecution claim, defendants must "provide a colorable basis for believing that 'others similarly situated have not been prosecuted' " to obtain discovery. 21 F.3d 1431, 1436 (1994) (quoting *United States v. Wayte,* 710 F.2d 1385, 1387 (CA9 1983), aff'd, 470 U.S. 598 (1985)). The Court of Appeals voted to rehear the case en banc, and the en banc panel affirmed the District Court's order of dismissal, holding that "a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated." 48 F.3d 1508, 1516(1995) (emphasis deleted). We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim. 516 U.S. 942 (1995).

Neither the District Court nor the Court of Appeals mentioned Federal Rule of Criminal Procedure 16, which by its terms governs discovery in criminal cases. Both parties now discuss the Rule in their briefs, and respondents contend that it supports the result reached by the Court of Appeals. Rule 16 provides, in pertinent part:

"Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects,

Page 462

buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Fed. Rule Crim. Proc. 16(a)(1)(C).

Respondents argue that documents "within the possession. . . of the government" that discuss the Government's prosecution strategy for cocaine cases are "material" to respondents' selective-prosecution claim. Respondents argue that the Rule applies because any claim that "results in nonconviction" if successful is a "defense" for the Rule's purposes, and a successful selective-prosecution claim has that effect. Tr. of Oral Arg. 30.

We reject this argument, because we conclude that in the context of Rule 16 "the defendant's defense" means the defendant's response to the Government's case in chief. While it might be argued that as a general matter, the concept of a "defense" includes any claim that is a "sword,"

challenging the prosecution's conduct of the case, the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the "shield-only" reading. If "defense" means an argument in response to the prosecution's case in chief, there is a perceptible symmetry between documents "material to the preparation of the defendant's defense," and, in the very next phrase, documents "intended for use by the government as evidence in chief at the trial."

If this symmetry were not persuasive enough, subdivision(a)(2) of Rule 16 establishes beyond peradventure that "defense" in subdivision (a)(1)(C) can refer only to defenses in response to the Government's case in chief. Rule 16(a)(2), as relevant here, exempts from defense inspection "reports, memoranda, or other internal government documents made

Page 463

by the attorney for the government or other government agents in connection with the investigation or prosecution of the case."

Under Rule 16(a)(1)(C), a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product in connection with his case. If a selective-prosecution claim is a "defense," Rule 16(a)(1)(C) gives the defendant the right to examine Government work product in every prosecution except his own. Because respondents' construction of "defense" creates the anomaly of a defendant's being able to examine all Government work product except the most pertinent, we find their construction implausible. We hold that Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case in chief, but not to the preparation of selective-prosecution claims.

In *Wade v. United States,* 504 U.S. 181 (1992), we considered whether a federal court may review a Government decision not to file a motion to reduce a defendant's sentence for substantial assistance to the prosecution, to determine whether the Government based its decision on the defendant's race or religion. In holding that such a decision was reviewable, we assumed that discovery would be available if the defendant could make the appropriate threshold showing, although we concluded that the defendant in that case did not make such a showing. See *id.,* at 186. We proceed on a like assumption here.

A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption," cf. *United States v. Mezzanatto,* 513 U.S. 196, 203

Page 464

(1995), that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. *Heckler v. Chaney,* 470 U.S. 821, 832 (1985). The Attorney General and United States Attorneys retain " 'broad discretion' " to enforce the Nation's criminal laws. *Wayte v. United States,* 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin,* 457 U.S. 368, 380, n. 11

(1982)). They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364(1978).

Of course, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder,* 442 U.S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe,* 347 U.S. 497, 500(1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles,* 368 U.S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and

oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886).

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." *Chemical Foundation, supra,* at 14-15. We explained in *Wayte* why courts are "properly hesitant to examine the decision whether to prosecute." 470 U.S., at 608. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.,* at 607. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.*

The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." *Id.,* at 608. The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Ibid.;* accord, *Oyler, supra,* at 456. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. This requirement has been established in our case law since *Ah Sin v. Wittman,* 198 U.S. 500 (1905). Ah Sin, a subject of China, petitioned a California state court for a writ of habeas corpus, seeking discharge from imprisonment under a San Francisco County

ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. *Id.,* at 503. He alleged in his habeas petition "that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise.' " *Id.,* at 507. We rejected his contention that this averment made out a claim under the Equal Protection Clause, because it did not allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." *Id.,* at 507-508.

The similarly situated requirement does not make a selective-prosecution claim impossible to prove. Twenty years before *Ah Sin,* we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. *Yick Wo,* 118 U.S., at 374. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings "under similar conditions." *Ibid.* We explained in *Ah Sin* why the similarly situated requirement is necessary:

"No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo case,* but that it was made so by the manner of its administration. This is a matter of proof, and *no fact should be omitted to make it out completely,* when the power of a Federal court is invoked

to interfere with the course of criminal justice of a State." 198 U.S., at 508 (emphasis added). Although *Ah Sin* involved federal review of a state conviction, we think a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the core powers of the Executive Branch of the Federal Government, the power to prosecute.

Respondents urge that cases such as *Batson v. Kentucky,* 476 U.S. 79 (1986), and *Hunter v. Underwood,* 471 U.S. 222 (1985), cut against any absolute requirement that there be a showing of failure to prosecute similarly situated individuals. We disagree. In *Hunter,* we invalidated a state law disenfranchising persons convicted of crimes involving moral turpitude. *Id.,* at 233. Our holding was consistent with ordinary equal protection principles, including the similarly situated requirement. There was convincing direct evidence that the State had enacted the provision for the purpose of disenfranchising blacks, *id.,* at 229-231, and indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites: Blacks were " 'by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under' " the law in question, *id.,* at 227 (quoting *Underwood v. Hunter,* 730 F.2d 614, 620 (CA11 1984)). *Hunter* thus affords no support for respondents' position.

In *Batson,* we considered "[t]he standards for assessing a prima facie case in the context of discriminatory selection of the venire" in a criminal trial. 476 U.S., at 96. We required a criminal

defendant to show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race" and that this fact, the potential for abuse inherent in a peremptory strike, and "any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Ibid.* During jury selection, the entire *res gestae* take place in front of the trial

Page 468

judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a "pattern" of singling out members of a single race for peremptory challenges. See *id.,* at97. He is in a position to discern whether a challenge to a black juror has evidentiary significance; the significance may differ if the venire consists mostly of blacks or of whites. Similarly, if the defendant makes out a prima facie case, the prosecutor is called upon to justify only decisions made in the very case then before the court. See *id.,* at 97-98. The trial judge need not review prosecutorial conduct in relation to other venires in other cases.

Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like "colorable basis," "substantial threshold showing," Tr. of Oral Arg. 5, "substantial and concrete basis," or "reasonable likelihood," Brief for Respondents Martin et al. 30. However, the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it. The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense," discriminatory effect and discriminatory intent. *United States v. Berrios,* 501 F.2d 1207, 1211 (CA2 1974).

Page 469

In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. 48 F. 3d, at 1516. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law. *United States v. Parham,* 16 F.3d 844, 846-847 (CA8 1994); *United States v. Fares,* 978 F.2d 52, 59-60 (CA2 1992); *United States v. Peete,* 919 F.2d 1168, 1176 (CA61990); *C. E. Carlson, Inc. v. SEC,* 859 F.2d 1429, 1437-1438 (CA10 1988); *United States v. Greenwood,* 796 F.2d 49, 52-53 (CA4 1986); *United States v. Mitchell,* 778 F.2d 1271, 1277 (CA7 1985). As the three-judge panel

explained, " '[s]elective prosecution' implies that a selection has taken place." 21 F. 3d, at 1436.[3]

The Court of Appeals reached its decision in part because it started "with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." 48 F. 3d, at 1516-1517. It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing Comm'n, 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, *ibid.;* and 91% of those convicted for pornography or prostitution were white, *id.,* at 41 (Table 13). Presumptions

Page 470

at war with presumably reliable statistics have no proper place in the analysis of this issue.

The Court of Appeals also expressed concern about the "evidentiary obstacles defendants face." 48 F. 3d, at 1514. But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. *Berrios, supra,* at 1211. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore

Page 471

reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice Souter, concurring.

I join the Court's opinion, but in its discussion of Federal Rule of Criminal Procedure 16 only to the extent of its application to the issue in this case.

Justice Ginsburg, concurring.

I do not understand the Court to have created a "major limitation" on the scope of discovery

available under Federal Rule of Criminal Procedure 16. See *post,* at 475 (Breyer, J., concurring in part and concurring in judgment). As I see it, the Court has decided a precise issue: whether the phrase "defendant's defense," as used in Rule 16(a)(1)(C), encompasses allegations of selective prosecution. I agree with the Court, for reasons the opinion states, that subdivision(a)(1)(C) does not apply to selective prosecution claims. The Court was not called upon to decide here whether Rule 16(a)(1)(C) applies in any other context, for example, to affirmative defenses unrelated to the merits. With the caveat that I do not read today's opinion as precedent foreclosing issues not tendered for review, I join the Court's opinion.

Justice Breyer, concurring in part and concurring in the judgment.

I write separately because, in my view, Federal Rule of Criminal Procedure 16 does not limit a defendant's discovery rights to documents related to the Government's case in chief. *Ante,* at 462-463. The Rule says that "the government shall permit the defendant to inspect and copy" certain physical items (I shall summarily call them "documents") "which are material to the preparation of the defendant's defense." Fed. Rule Crim. Proc. 16(a)(1)(C). A "defendant's defense" can take many forms, including (1) a simple response

Page 472

to the Government's case in chief, (2) an affirmative defense unrelated to the merits (such as a Speedy Trial Act claim), (3) an unrelated claim of constitutional right, (4) a foreseeable surrebuttal to a likely Government rebuttal, and others. The Rule's language does not limit its scope to the first item on this list. To interpret the Rule in this limited way creates a legal distinction that, from a discovery perspective, is arbitrary. It threatens to create two full parallel sets of criminal discovery principles. And, as far as I can tell, the interpretation lacks legal support.

The Court bases its interpretation upon what it says is a "perceptible symmetry," *ante,* at 462, between two phrases in Rule 16(a)(1)(C)—the phrase "material to the preparation of the defendant's defense," and the next phrase, "intended for use by the government as evidence in chief at the trial." To test the Court's argument, consider these two phrases in context. The Rule says:

"Upon request of the defendant the government shall permit the defendant to inspect and copy [documents and other items] . . . which [1] are material to the preparation of the defendant's defense or [2] are intended for use by the government as evidence in chief at the trial, or [3] were obtained from or belong to the defendant." Fed. Rule Crim. Proc. 16(a)(1)(C).

Though symmetry may reside in the eye of the beholder, I can find no relevant symmetry here. Rather, the language suggests a simple three-part categorization of the documents and other physical items that the Rule requires the Government to make available to the defendant. From a purely linguistic perspective, there is no more reason to import into the first category a case-in-chief-related limitation (from the second category) than some kind of defendant's-belongings-related limitation (from the third category).

Rule 16 creates these three categories for a reason that belies "symmetry"—namely, to specify two sets of items (the

Page 473

Government's case in chief evidence, the defendant's belongings) that the Government must

make available to the defendant without a preliminary showing of "materiality." The Rule's first category creates a residual classification (items "material to the preparation of the defendant's defense") that require a preliminary "materiality" showing. The Committee thought, however, that "[l]imiting the rule to situations in which the defendant can show that the evidence is material seems unwise. . . . For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant." Advisory Committee's Notes on Fed. Rule Crim. Proc. 16, 18 U.S.C. App., p. 762 (second and third categories added to specify that, *without a special showing of materiality,* certain items are almost always "material") (citing 1 C. Wright, Federal Practice and Procedure § 254,p. 510, n. 58, p. 513, n. 70 (1969)). Nothing in the Notes, or in the Rule's language, suggests that the residual category of items "material to the preparation of the defendant's defense," means to cover only those items related to the case in chief.

The only other reason the majority advances in support of its "case in chief" limitation concerns a later part of the Rule, subdivision 16(a)(2). As relevant here, that subdivision exempts Government attorney work product from certain of Rule 16's disclosure requirements. In the majority's view, since (1) a defendant asserting a valid "selective prosecution" defense would likely need prosecution work product to make his case, but (2) the Rule exempts prosecution work product from discovery, then (3) the Rule must have some kind of implicit limitation (such as a "case in chief" limitation) that makes it irrelevant to defense efforts to assert "selective prosecution" defenses.

The majority's conclusion, however, does not follow from its premises. For one thing, Rule 16's work-product exception

may itself contain implicit exceptions. After all, "[t]he privilege derived from the work-product doctrine is not absolute." *United States v. Nobles,* 422 U.S. 225, 239 (1975); see also 8 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 2022, p. 324 (2d ed. 1994) (in civil context, work product "is discoverable only on a substantial showing of 'necessity or justification' ") (quoting *Hickman v. Taylor,* 329 U.S. 495, 510 (1947)); J. Ghent, Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A. L. R. 3d 412, 465-469, § 25 (1971) (in civil context, work-product protection is not absolute, but is a "qualified privilege or immunity"). To the extent such a reading permits a defendant to obtain "work product" in an appropriate case (say, with a strong prima facie showing of selective prosecution), the Court's problem does not exist. Of course, to read the work-product exception as containing some such implicit exception itself represents a departure from the Rule's literal language. But, is it not far easier to believe the Rule's authors intended some such small implicit exception to an exception, consistent with the language and purpose of the Rule, than that they intended the very large exception created by the Court?

For another thing, even if one reads the work-product exception literally, the Court's problem disappears as long as courts can *supplement* Rule 16 discovery with discovery based upon *other* legal principles. The language of the work-product exception suggests the possibility of such supplementation, for it says, not that work product is "exemp[t]" from discovery, *ante,* at 462, but

that " *this rule* " does not authorize discovery of the prosecutor's work product. Fed. Rule Civ. Proc. 16(a)(2). The Advisory Committee's Notes make clear that the Committee believed that *other* rules of law may authorize (or require) discovery not mentioned in the Rule. See, *e. g.,* Advisory Committee's Notes on Rule 16, 18 U.S.C. App., pp. 762, 763 (discussion of *Brady v. Maryland,* 373 U.S. 83 (1963), which the Rule does not codify);

Page 475

18 U.S.C. App., p. 761 ("[Rule 16] is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases"); see also 2 C. Wright, Federal Practice and Procedure § 254,p. 81, and n. 60 (2d ed. 1982) ("Because Brady is based on the Constitution, it overrides court-made rules of procedure. Thus the work-product immunity for discovery in Rule 16(a)(2) prohibits discovery under Rule 16 but it does not alter the prosecutor's duty to disclose material that is within Brady") (footnotes omitted). Of course, the majority, in a sense, reads the Rule as permitting supplementation, but it does more. It goes well beyond the *added* (say, constitutionally related) rule supplementation needed to overcome its problem; instead, it *shrinks* the Rule by unnecessarily creating a major limitation on its scope.

Finally, and in any event, here the defendants sought discovery of information that is not work product. See *ante,* at 459. Thus, we need not decide whether in an appropriate case it would be necessary to find an implicit exception to the language of Rule 16(a)(2), or to find an independent constitutional source for the discovery, or to look for some other basis.

In sum, neither the alleged "symmetry" in the structure of Rule 16(a)(1)(C), nor the work-product exception of Rule 16(a)(2), supports the majority's limitation of discovery under Rule 16(a)(1)(C) to documents related to the Government's "case in chief." Rather, the language and legislative history make clear that the Rule's drafters meant it to provide a broad authorization for defendants' discovery, to be supplemented if necessary in an appropriate case. Whether or not one can *also* find a basis for this kind of discovery in other sources of law, Rule 16(a)(1)(C) provides *one* such source, and we should consider whether the defendants' discovery request satisfied the Rule's requirement that the discovery be "material to the preparation of the defendant's defense."

Page 476

I believe that the defendants' request did not satisfy this threshold. Were the "selective prosecution" defense valid in this case— *i. e.*, were there "clear evidence," *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14 (1926), that the Federal Government's prosecutorial policy "had a discriminatory effect and . . . was motivated by a discriminatory purpose," *Wayte v. United States,* 470 U.S. 598, 608 (1985), it should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African-Americans, but also some instances in which the Federal Government did not prosecute similarly situated caucasians. The defendants' failure to do so, for the reasons the Court sets forth, amounts to a failure to make the necessary threshold showing in respect to materiality. See 2C. Wright, Federal Practice and Procedure § 254, pp. 66-67 (2d ed. 1982); *United States v. Balk,* 706 F.2d 1056, 1060 (CA9 1983); *United States v. Johnson,* 577 F.2d 1304, 1309 (CA5 1978); *United States v. Murdock,*

548 F.2d 599, 600 (CA5 1977).

Justice Stevens, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14-15 (1926). Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. *Oyler v. Boles,* 368 U.S. 448, 456 (1962). For that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled. As the Court notes, however, the scope of judicial review of particular exercises of that discretion is not fully defined. See *ante,* at 469, n. 3.

Page 477

The United States Attorney for the Central District of California is a member and an officer of the bar of that District Court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a District Judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern. I agree with the Court that Rule 16 of the Federal Rules of Criminal Procedure is not the source of the District Court's power to make the necessary inquiry. I disagree, however, with its implicit assumption that a different, relatively rigid rule needs to be crafted to regulate the use of this seldom-exercised inherent judicial power. See Advisory Committee's Notes on Rule 16, 18 U.S.C. App., p. 761 (Rule 16 is "not intended to limit the judge's discretion to order broader discovery in appropriate cases").

The Court correctly concludes that in this case the facts presented to the District Court in support of respondents' claim that they had been singled out for prosecution because of their race were not sufficient to prove that defense. Moreover, I agree with the Court that their showing was not strong enough to give them a *right* to discovery, either under Rule 16 or under the District Court's inherent power to order discovery in appropriate circumstances. Like Chief Judge Wallace of the Court of Appeals, however, I am persuaded that the District Judge did not abuse her discretion when she concluded that the factual showing was sufficiently disturbing to require some response from the United States Attorney's Office. See 48 F.3d 1508, 1520-1521 (CA9 1995). Perhaps the discovery order was broader than necessary, but I cannot agree with the Court's apparent conclusion that no inquiry was permissible.

The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial

Page 478

vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine.[1] Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the

distribution of 5,000 grams of powder cocaine.[2] The Sentencing Guidelines extend this ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine.[3] These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders.[4] United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 145 (Feb. 1995) (hereinafter Special Report).

Page 479

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the Federal Government. See *id.,* at x, 129-138. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount.[5]

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they

Page 480

represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. *Id.,* at 39, 161. During the first 18 months of full guideline implementation, the sentencing disparity between black and white defendants grew from preguideline levels: Blacks on average received sentences over 40% longer than whites. See Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? 6-7 (Dec. 1993). Those figures represent a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing. The Sentencing Commission acknowledges that the heightened crack penalties are a "primary cause of the growing disparity between sentences for Black and White federal defendants." Special Report 163.

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

Respondents submitted a study showing that of all cases involving crack offenses that were closed by the Federal Public Defender's Office in 1991, 24 out of 24 involved black defendants. To supplement this evidence, they submitted affidavits from two of the attorneys in the defense team. The first reported a statement from an intake coordinator at a local drug treatment center that, in his experience, an

Page 481

equal number of crack users and dealers were caucasian as belonged to minorities. App. 138. The second was from David R. Reed, counsel for respondent Armstrong. Reed was both an active court-appointed attorney in the Central District of California and one of the directors of the leading association of criminal defense lawyers who practice before the Los Angeles County courts. Reed stated that he did not recall "ever handling a [crack] cocaine case involving non-black defendants" in federal court, nor had he even heard of one. *Id.,* at 140. He further stated that "[t]here are many crack cocaine sales cases prosecuted in state court that *do* involve racial groups other than blacks." *Id.,* at 141 (emphasis in original).

The majority discounts the probative value of the affidavits, claiming that they recounted "hearsay" and reported "personal conclusions based on anecdotal evidence." *Ante,* at 470. But the Reed affidavit plainly contained more than mere hearsay; Reed offered information based on his own extensive experience in both federal and state courts. Given the breadth of his background, he was well qualified to compare the practices of federal and state prosecutors. In any event, the Government never objected to the admission of either affidavit on hearsay or any other grounds. See 48 F. 3d, at 1518, n. 8. It was certainly within the District Court's discretion to credit the affidavits of two members of the bar of that Court, at least one of whom had presumably acquired a reputation by his frequent appearances there, and both of whose statements were made on pains of perjury.

The criticism that the affidavits were based on "anecdotal evidence" is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one. Certainly evidence based on a drug counselor's personal observations or on an attorney's practice in two sets of courts, state and federal, can " 'ten[d] to show the existence' " of a selective prosecution. *Ante,* at 468.

Page 482

Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and demand information from the Government's files to support or refute respondents' evidence. The presumption that some whites are prosecuted in state court is not "contradicted" by the statistics the majority cites, which show only that high percentages of blacks are *convicted* of certain federal crimes, while high percentages of whites are convicted of other federal crimes. See *ante,* at 469-470. Those figures are entirely consistent with the allegation of selective prosecution. The relevant comparison, rather, would be with the percentages of blacks and whites who *commit*

those crimes. But, as discussed above, in the case of crack far greater numbers of whites are believed guilty of using the substance. The District Court, therefore, was entitled to find the evidence before it significant and to require some explanation from the Government.[6]

In sum, I agree with the Sentencing Commission that "[w]hile the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100-to-1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects." Special Report138.[7] The severity of the penalty heightens both the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement. Cf. *McCleskey v. Kemp,* 481 U.S. 279, 366 (1987) (Stevens, J., dissenting). In this case, the evidence was sufficiently disturbing to persuade the District Judge to order discovery that might help explain the conspicuous racial pattern of cases before her court. I cannot accept the majority's conclusion that the District Judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.

Notes:

[*] Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent F. Scheidegger;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for former law enforcement officials and police organizations et al. by *David Cole;* for the National Association of Criminal Defense Lawyers by *Judy Clarke* and *Nancy Hollander;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Elaine R. Jones, Theodore M. Shaw, George H. Kendall,* and *Steven R. Shapiro.*

[1] Other defendants had introduced this study in support of similar discovery motions in at least two other Central District cocaine prosecutions. App. 83. Both motions were denied. One District Judge explained from the bench that the 23-person sample before him was "statistically insignificant," and that the evidence did not indicate "whether there is a bias in the distribution of crime that says black people use crack cocaine, hispanic people use powdered cocaine, caucasian people use whatever it is they use." *Id.,* at 119, 120.

[2] We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race. Here, "it was the government itself that suggested dismissal of the indictments to the district court so that an appeal might lie." 48 F.3d 1508, 1510 (CA9 1995).

[3] We reserve the question whether a defendant must satisfy the similarly situated requirement in a case "involving direct admissions by [prosecutors] of discriminatory purpose." Brief for United States 15.

[1] 100 Stat. 3207, 21 U.S.C. § 841 *et seq.*

[2] Compare 21 U.S.C. § 841(b)(1)(A)(iii) with § 841(b)(1)(A)(ii). Similarly, a mandatory 5-year sentence is prescribed for distribution of 500 grams of cocaine or 5 grams of crack. Compare § 841(b)(1)(B)(ii) with § 841(b)(1)(B)(iii). Simple possession of 5 grams of crack also produces a mandatory 5-year sentence. The maximum sentence for possession of *any* quantity of other drugs

is one year. § 844(a).

With one prior felony drug offense, the sentence for distribution of 50 grams of crack is a mandatory 20 years to life. § 841(b)(1)(A). With two prior felony drug offenses, the sentence is a mandatory life term without parole. *Ibid.*

[3] See United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 1995) (USSG).

[4] Under the Guidelines, penalties increase at a slower rate than drug quantities. For example, 5 grams of heroin result in a base offense level of 14 (15-21 months) while 10 grams of heroin (double the amount) result in an offense level of 16 (21-27 months). USSG §§ 2D1.1(c)(13), (12). Thus, the 100-to-1 ratio does not translate into sentences that are 100 times as long.

[5] Hampton was charged with conspiracy to distribute, four counts of crack distribution, and the use or carrying of a firearm in relation to a drug crime. According to an information filed by the Government, Hampton had three prior convictions for felony drug offenses. See Information Establishing Prior Felony Narcotics Convictions (June 24, 1992). Therefore, he potentially faces a mandatory life sentence on the drug charges alone.

Under California law at the time of the offenses, possession for sale of cocaine base involving 50 grams carried a penalty of imprisonment for either three, four, or five years. Cal. Health & Safety Code Ann. § 11351.5 (West 1988). If the defendant had no prior convictions, he could be granted probation. § 11370. For each prior felony drug conviction, the defendant received an additional 3-year sentence. § 11370.2. Thus, with three priors and the possibility of worktime reductions, see Cal. Penal Code Ann. § 2933 (West Supp. 1996), Hampton could have served as little as six years under California law. Since the time of the offenses, California has r aised several of these penalties, but the new punishments could not be applied to respondents.

[6] Also telling was the Government's response to respondents' evidentiary showing. It submitted a list of more than 3,500 defendants who had been charged with federal narcotics violations over the previous three years. It also offered the names of 11 nonblack defendants whom it had prosecuted for crack offenses. All 11, however, were members of other racial or ethnic minorities. See 48 F.3d 1508, 1511 (CA9 1995). The District Court was authorized to draw adverse inferences from the Government's inability to produce a single example of a white defendant, especially when the very purpose of its exercise was to allay the court's concerns about the evidence of racially selective prosecutions. As another court has said: "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero . . . ." *United States v. Hinds County School Bd.*, 417 F.2d 852, 858 (CA5 1969) *(per curiam)*.

[7] For this and other reasons, the Sentencing Commission in its Special Report to Congress "strongly recommend[ed] against a 100-to-1 quantity ratio." Special Report 198. The Commission shortly thereafter, by a 4-to-3 vote, amended the Guidelines so as to equalize the treatment of crack and other forms of cocaine, and proposed modification of the statutory mandatory minimum penalties for crack offenses. See Statement of Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy (May 1, 1995). In October 1995, Congress overrode the Sentencing Commission's Guideline amendments. See Pub.L. 104-38, 109 Stat. 334. Nevertheless, Congress at the same time directed the Commission to submit

recommendations regarding changes to the statutory and guideline penalties for cocaine distribution, including specifically "revision of the drug quantity ratio of crack cocaine to powder cocaine." § 2(a).

---

397 F.3d 274 (5th Cir. 2005)

In re: UNITED STATES of America, Petitioner.

No. 05-20001.

United States Court of Appeals, Fifth Circuit

January 12, 2005

Paula Camille Offenhauser, James Lee Turner, Asst. U.S. Attys., Michael Taylor Shelby, Daniel Casanova Rodriguez, Tony Ray Roberts, Houston, TX, for Petitioner.

Craig A. Washington, Houston, TX, for Respondent.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas.

Before JONES, BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:

In this case, the Government has requested a writ of mandamus to prevent the federal district court from enforcing discovery orders in a federal death penalty case not by dismissing the Government's Notice of Intent to seek the death penalty against this defendant, but by poisoning the jury's consideration of that option with an impermissible punishment phase instruction.

The court also threatened to delay the scheduled start of the proceedings for a year. For the following reasons, we grant the writ, and expect proceedings to resume promptly.

Background

Defendant Tyrone Mapletoft Williams ("Williams") is awaiting trial for his alleged role in an illegal alien smuggling conspiracy that resulted in the deaths of nineteen undocumented aliens. According to the indictment, on or about May 13, 2003, after several co-conspirators loaded seventy-four illegal aliens into an enclosed trailer at or near Harlingen, Texas, Williams and co-defendant Fatima Holloway, the only two African-American participants, drove the tractor-trailer rig to a prearranged destination at or near Victoria, Texas. Williams was the driver and Holloway was sitting in the passenger seat.

As alleged, during the trip, several aliens began to bang on the locked trailer, begging to be released from the oppressive heat inside. As the aliens screamed for mercy, Holloway allegedly told Williams to turn on the refrigeration device in the trailer, or, alternatively, to let the aliens out. Williams allegedly rejected these requests and continued to drive. The Government alleges that as a direct result of this decision nineteen of the aliens died from heat exhaustion and/or suffocation.

On March 15, 2004, a grand jury in the Southern District of Texas returned a sixty-count superseding indictment charging all fourteen co-defendants with various alien smuggling offenses in violation of 8 U.S.C. § 1324. Because of the deaths of some of the illegal aliens, nearly all defendants involved in the transportation were death penalty-eligible. 8 U.S.C. § 1324(a) (1) (B)

(iv). On the day the grand jury returned the superseding indictment, the United States filed a Notice of Intent to Seek the Death Penalty only against Williams. [1] Two days later, Judge Vanessa Gilmore severed Williams's case [2] and set his trial for January 5, 2005.

On October 22, 2004, Williams filed a Motion to Dismiss the Notice of Intent to Seek the Death Penalty, or alternatively, for Discovery of Information Relating to the Government's Capital-Charging Practices. Williams's motion substantively states:

Page 278

The United States of America has determine [sic] to seek the death penalty against TYRONE MAPLETOFT WILLIAMS because of his race.

According to the original and superceding [sic] indictment returned in this case, TYRONE MAPLETOFT WILLIAMS is the only person of African-American descent, other than FATIMA HOLLOWAY, who was indicted for activity relating to the facts and circumstances charged in the indictment. Upon the original return of the indictment, the United States of America made many far-reaching and profound statements which had the pendency [sic] to demonize many of the alleged participants in the activity that resulted in the indictment. All of the other persons mentioned in the indictment are of Hispanic descent and none are African-American. Of the persons who are alleged to have concocted the conspiracy, profited greatly from the conspiracy and who undertook a leadership role in the conspiracy, none are African-American. Of all the persons named in the indictment, the Government is seeking the death penalty only as to TYRONE MAPLETOFT WILLIAM [sic].

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the Notice of Intent to Seek the Death Penalty be dismissed, that the Notice of Special Findings be stricken, or, in the alternative, that the Court provide an evidentiary hearing at which time the Defendant will make a credible showing that all of the similarly situated individuals in this indictment are of a different race and not subjected to the death penalty, and the Defendant further prays that the Court grant this Motion for Discovery of Information Relating to the Government's Capital-Charging Practices, and for such other relief to which he may show himself entitled.

Williams also filed a Memorandum of Points and Authorities in Support of his motion, which states in its entirety:

In *United States v. Armstrong,* 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the United States Supreme Court held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of discriminatory effect and discriminatory intent. *United States v. Bass,* 536 U.S. 862, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002). The Defendant in this case will not rely upon a statistical showing based upon nationwide information relating to the way the United States charges blacks with death-eligible offenses in comparison to the way that they charge whites. In this case, the discriminatory effect and discriminatory intent are clear to the naked eye. Similarly situated persons are treated differently and they are named in the same indictment with this Defendant. A prima facia [sic] case is made by the indictment itself.

Under the equal protection component of the Fifth Amendment's Due Process Clause, the decision whether to prosecute may not be based on an arbitrary classification, such as race or religion. *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 505-06, 7 L.Ed.2d 446 [(1962)]. In order

to prove a selective-prosecution claim, this Defendant must demonstrate that the *prosecutorial* policy had a discriminatory effect and a discriminatory purpose. *Ibid.* To establish a discriminatory effect in a race case, this Defendant must show that similarly-situated individuals of a different race were not prosecuted. *Ah Sin v. Wittman,* 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142 [(1905)], *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712[, 90 L.Ed.2d 69 (1986)],

Page 279

Hunter v. Underwood, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 [(1985)], distinguished. The Court, in *Armstrong,* ruled that a defendant must produce credible evidence that similarly-situated defendants of other races could have been prosecuted, but were not. In the *Armstrong* case, the Court held that the required threshold was not met. In this case, that threshold is met on its face. It is abundantly clear that TYRONE MAPLETOFT WILLIAMS is black and is the only person for whom the death penalty is being sought. It is abundantly clear that all of the other Co-Defendants are not black, with the exception of FATIMA HOLLOWAY.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court grant his Motion to Dismiss and Strike, or in the alternative, the Motion for Discovery, and grant him an evidentiary hearing in order that he may make a prima facia [sic] case on the allegations contained in his Motion, which is filed contemporaneously with this Memorandum of Points and Authorities in support of same.

After summarily declaring that Williams had made a prima facie case under *Armstrong,* Judge Gilmore granted Williams's vague "Motion for Discovery of Information Relating to the Government's Capital-Charging Practices." After a series of clarifications, [3] Judge Gilmore declared that the Government was required to produce information that "relates generally to the capital charging practices of the Attorney General of the United States including but not limited to the charging practices that were employed in this specific case." Nov. 10, 2004, Order. Judge Gilmore noted that her order did "not, however, prohibit the Government from raising any *legitimate* objections based on privilege or work product." *Id.* (emphasis in original).

Attempting to comply with Judge Gilmore's order, the Government on November 24, 2004, filed a "Notice of Discovery in Response to Court Order," which discussed the United States Attorney's protocol for federal death penalty prosecutions, including how the determination to seek the death penalty is made. The filing included statistical information about the capital charging practices of the Attorney General. At a November 29, 2004, status hearing, Judge Gilmore rejected the Government's filing as non-responsive, and expressed anger at the Government's lack of compliance and refusal to assert privilege with specificity. [4] The United

Page 280

States then filed an Addendum, in which it formally asserted privilege as to all other information rendered discoverable by Judge Gilmore. The Government specifically asserted privilege under the theories of deliberative process, work product, and attorney-client privilege.

On December 16, Williams responded by filing a Motion for Contempt, and moved in the alternative to dismiss the Death Notice. Williams attached a "report" of about sixty-eight other cases involving alien smuggling and asserted that the defendants in those cases were "similarly situated" with Williams. At a status hearing the next day, Judge Gilmore praised the information,

commenting to the Government that "[t]he information that he got from this other guy is exactly the kind of stuff y'all should have been giving. That's better information than what y'all gave." Tr. at 14. When the Government attempted to refute the information contained in the exhibit, Judge Gilmore stopped the Government attorneys and instead asked why they had not complied with her discovery order. [5] After additional attempts by the Government attorneys to explain that they were asserting privilege, based on their own analysis and after consultation with Department of Justice officials in Washington, the following exchange occurred:

The Court: Well, then you tell them [the DOJ officials in Washington] to write me a letter, because if they don't you're getting held in contempt. I want a letter on my desk this afternoon from them saying, from the Attorney General that needs to be signed saying that they are refusing to comply with the Court's order, and that the reason that you can't do it is because the Attorney General of the United States has ordered you not to do so.

Mr. Roberts: Okay, well, Your Honor, I am here as a representative of them; and I am advising you that we are not going to comply with this order.

The Court: No. That is not good enough. Otherwise you are going to be in contempt this afternoon. I need it in writing; it needs to be signed by the Attorney General saying that the reason that you as an Assistant United States Attorney in Houston cannot comply with my order is because the Attorney General of the United States is prohibiting you from doing so based on separation of powers theory; that you will not disclose to this Court the basis upon which you chose in this case to indict the only black defendant for a death penalty

Page 281

crime in a case in which 14 defendants were involved in this smuggling and in which he was not the leader or the organizer or manager of this smuggling operation. I need it in writing, and I need it today. And if I don't have it by the end of the day, then you are going to be held in contempt. Do you understand me?

Tr. at 19-20.

Mr. Roberts then attempted to bring up sanctions. Judge Gilmore refused to address sanctions at that time, and then stated, "But presumably, you are going to just go back and get a letter from the Attorney General telling me to kiss their butt basically." Tr. at 21. As we discern, Judge Gilmore's order, with a threat of contempt behind it, required the Government to allow Williams access to its internal, privileged data concerning its use of its discretion in seeking the death penalty, or a letter from the Attorney General of the United States himself asserting privilege. Rather than supply this discovery, the Government continued to assert privilege and to explain why Attorney General Ashcroft would not be personally participating in the case.

On December 29, Judge Gilmore entered an order refusing to dismiss the Notice of Intent to Seek the Death Penalty, which the Government had proffered as an appropriate sanction. *Cf. Armstrong,* 116 S.Ct. at 1484 n. 2 (noting that the Government suggested dismissing the indictment so that an interlocutory appeal might lie); *see also United States v. Frye,* 372 F.3d 729, 733-34 (5th Cir. 2004) (discussing the ability of the government to seek, and a court of appeals to hear, an interlocutory appeal where a district court strikes the death penalty pursuant to 18 U.S.C. § 3731). Instead, Judge Gilmore crafted a "sanction": a jury instruction which she intended to read

to the jury during the punishment phase of the trial if Williams were found guilty:

[The Government] failed and refused to obey an order of this Court that [it disclose to the Defendant information relating to the Government's capital charging practices and to the issue of whether the Government is seeking the death penalty against the Defendant because of his race.] The Court's order was a lawful one [].

The refusal to obey the order is not sufficient to [dismiss the Government's Notice of Intent to Seek the Death Penalty.] You may consider the failure and refusal of [the Government] to obey a lawful order of the Court, however, and may give it such weight as you think it is entitled to as tending to prove [that the Government is seeking the death penalty against the Defendant for discriminatory reasons.]

* * * * *

If it is peculiarly within the power of [the Government] to produce [evidence relating to the Government's capital charging practices], failure to [produce that evidence] may give rise to an inference that this [evidence] would have been unfavorable to [the Government]. No such conclusion should be drawn by you, however, with regard to [evidence that] is equally available to both parties or where the [admission of the evidence] would be merely repetitive or cumulative. The jury must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Page 282

Order, Dec. 29, 2004. [6] Judge Gilmore denied a motion for reconsideration, a motion for a stay, and a motion for a final order, and then ordered the case to proceed to trial as scheduled on January 5, 2005.

On December 31, the Government petitioned this court for a brief stay to enable the filing of a writ of mandamus concerning the discovery orders [7] and sanctions imposed by Judge Gilmore. We stayed proceedings in the trial court pending our review of the Government's petition. [8]

Jurisdiction

The common-law writ of mandamus is codified at 28 U.S.C. § 1651(a). A writ of mandamus is an extraordinary remedy. "It is charily used and is not a substitute for appeal." *In re Chesson,* 897 F.2d 156, 159 (5th Cir. 1990). Mandamus is appropriate only "when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Dresser Indus., Inc.,* 972 F.2d 540, 543 (5th Cir. 1992) (citing *In re Chesson,* 897 F.2d at 159). Specifically, a court must find three requirements before a writ will issue: (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States District Court for the District of Columbia,* --- U.S. ----, 124 S.Ct. 2576, 2587, 159 L.Ed.2d 459 (2004) (partially quoting *Will v. United States,* 389 U.S. 90, 95, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967) (alterations in original; internal citations and quotations omitted)).

As the Supreme Court has recently noted, "[t]hese hurdles, however demanding, are not

insuperable. [Federal courts]
Page 283
ha[ve] issued the writ to restrain a lower court when its actions would threaten the separation of powers by 'embarass[ing] the executive arm of the Government.' " *Id.* at 2587 (quoting *Ex parte Republic of Peru,* 318 U.S. 578, 588, 63 S.Ct. 793, 799, 87 L.Ed. 1014 (1943)). In fact, "[a]ccepted mandamus standards are broad enough to allow the court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney,* 124 S.Ct. at 2587 (citing *Clinton v. Jones,* 520 U.S. 681, 701, 117 S.Ct. 1636, 1648, 137 L.Ed.2d 945 (1997)).

Relevant to this case, various courts of appeals have found mandamus appropriate in all three issues intertwined in this petition: jury instructions, discovery orders, and assertions of privilege. Both the Second and Third Circuits have permitted the Government to obtain writs of mandamus when a proposed criminal jury instruction clearly violated the law, risked prejudicing the Government at trial with jeopardy attached, and provided the Government no other avenue of appeal. *See United States v. Pabon-Cruz,* 391 F.3d 86, 91-92 (2d Cir. 2004); *United States v. Wexler,* 31 F.3d 117, 121 (3d Cir. 1994). Further, this court, in accord with other circuits, has considered and issued writs of mandamus over discovery orders implicating privilege claims. *See In re Avantel,* 343 F.3d 311, 317 (5th Cir. 2003); *accord In re Occidental Petroleum Corp.,* 217 F.3d 293, 295 (5th Cir. 2000); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800, 804 (Fed.Cir. 2000); *In re General Motors Corp.,* 153 F.3d 714, 715 (8th Cir. 1998); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC,* 964 F.2d 159, 163 (2d Cir. 1992); *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487, 492 (7th Cir. 1970), *aff'd,* 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971) ("[B]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.").

Discussion

As the petitioner, the Government must first show that it has no alternative means of relief. In her final ruling on the discovery issue, Judge Gilmore could have dismissed the Death Notice, as the Government requested, and her ruling would have been immediately appealable. *See* 18 U.S.C. § 3731; *Frye,* 372 F.3d at 733-34. Instead, Judge Gilmore styled her order a discovery "sanction" on the Government, which is ordinarily unavailable for interlocutory appeal. If Williams were acquitted of the death penalty, double jeopardy would preclude the Government from appealing Judge Gilmore's unusual jury instruction. Thus, the Government's only recourse was through a writ of mandamus. *Cf. Pabon-Cruz,* 391 F.3d at 91 ("Challenges to a proposed jury charge may properly be considered on a petition for a writ of mandamus."); *accord United States v. Wexler,* 31 F.3d at 117.

Next, the Government must show that its right to issuance of the writ is "clear and indisputable." *Cheney,* 124 S.Ct. at 2587 (quotations omitted). The Government asserts that Judge Gilmore clearly erred in two principal, related ways: (1) by incorrectly applying *United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), and thus improperly

ordering discovery against the United States; and (2) by styling a discovery "sanction" that contravenes the Federal Death Penalty Act and creates an unauthorized defense against the death penalty. We agree as to both claims.

Page 284

"[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision, whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). The exercise of prosecutorial discretion is limited by the Equal Protection Clause, however. A court's consideration of an Equal Protection-based claim of selective prosecution necessarily begins with a presumption of good faith and constitutional compliance by the prosecutors. *See Armstrong,* 517 U.S. at 465-66, 116 S.Ct. at 1486-87. To overcome this presumption, a defendant must prove both discriminatory effect and discriminatory purpose by presenting "clear evidence." *Id.* at 465, 116 S.Ct. at 1486 (quoting *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)). Before a criminal defendant is entitled to any discovery on a claim of selective prosecution, he must make out a prima facie case. The prima facie case of selective prosecution requires the criminal defendant to bring forward some evidence that similarly situated individuals of a different race could have been prosecuted, but were not. *Armstrong,* 517 U.S. at 465, 116 S.Ct. at 1487; *United States v. Webster,* 162 F.3d 308, 333-34 (5th Cir. 1998). More specifically, a defendant must first present evidence of *both* discriminatory effect *and* discriminatory intent. *Id.*

In concluding that Williams had made a prima facie case of selective prosecution, Judge Gilmore ignored Supreme Court precedent and the plain facts *as stated by the defendant himself.* First, Williams's counsel admits in his Memorandum that he needs discovery so "that he may make a prima facia [sic] case on the allegations" of selective prosecution. Williams thus concedes that he cannot make out a prima facie case, which is what he must do prior to receiving any discovery. *See Armstrong,* 517 U.S. at 468, 116 S.Ct. at 1488; *Webster,* 162 F.3d at 333-34.

Equally important, Williams's scant court filings acknowledge that the Government declined to pursue the death penalty against a similarly situated, black co-defendant. [9] To adopt the language of Williams's counsel, it is "clear to the naked eye" that Williams has not made the requisite showing under *Armstrong* to warrant discovery on a selective prosecution claim. As the Government continually argued to Judge Gilmore, only Williams and Holloway--both of whom are African-American--were in the truck at the time of the alleged events, making them the only "similarly situated" co-defendants. In stark contrast, no other co-defendants, although part of the conspiracy and ultimately responsible for the acts (if proven at trial), were on the scene during the lethal interval. Only Williams, the driver of the truck, was allegedly able to prevent the victims' deaths; for this reason, the Government is pursuing the death penalty against Williams alone. The Notice of Intent to Seek the Death Penalty emphasizes this distinction. Because Williams could not demonstrate that similarly situated, non-African-American co-defendants were treated differently, he could not sustain his burden even as to this prong of *Armstrong.* [10]

Page 285

Finally, the "study" submitted by Williams is exactly the type of evidence that warranted

summary reversal of a court of appeals when used to justify discovery in a selective prosecution claim. *See Bass,* 536 U.S. at 862, 122 S.Ct. at 2389. Although Williams's "study" does involve defendants charged with alien smuggling, sharing a charge alone does not make defendants "similarly situated" for purposes of a selective prosecution claim. [11] A much stronger showing, and more deliberative analysis, is required before a district judge may permit open-ended discovery into a matter that goes to the core of a prosecutor's function and implicates serious separation of powers concerns. Judge Gilmore's misapplication of *Armstrong* represents clear legal error.

Nevertheless, under the second prong of mandamus review, the writ should not issue unless Judge Gilmore's discovery orders and sanction also represented a clear abuse of discretion. *See Cheney,* 124 S.Ct. at 2587. This they did.

First, the court continually expanded the breadth of permissible discovery. Initially, she permitted broad and vague discovery of the Government's "capital-charging practices." *See* Order, Oct. 29, 2004. [12] Next, after the Government provided significant, generalized information, Judge Gilmore ordered the Government to reveal its capital-charging practices "inclusive of this case but not this case exclusively." *See* Status Conference, Nov. 1, 2004, Tr. at 17. The Government repeatedly asserted work product, attorney-client, and deliberative process privileges against these orders.

In the ordinary case, a party must claim privilege with specificity, and a court can ultimately demand *in camera* review of privileged documents. *See, e.g., In re Grand Jury Proceedings,* 55 F.3d 1012, 1015 (5th Cir. 1995). In this extreme situation, however, the Government's assertion of privilege was sufficient. *Cf. Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375, 380 (2d Cir. 1973) (refusing to permit even *in camera* review of information relating to the exercise of prosecutorial discretion). The court's ever-changing and inspecific orders afforded no boundaries on discovery, and in effect compelled the Government to volunteer information (as opposed to responding to a request by Williams), contrary to *Armstrong* and to Federal Rule of Criminal Procedure 16. *See Armstrong, supra* n. 13. Moreover, turning over any further

information--even *in camera*--would require documents, affidavits, or perhaps even depositions from several levels of the Department of Justice, all of which could engender various privilege claims, and as a precedent, could be subject to abuse in this and in future cases. Based on the minimal showing made by Williams, Judge Gilmore clearly abused her discretion in granting wide-ranging discovery. [13]

The nature of the "sanction" imposed by the trial court is also relevant to whether the trial court abused its discretion. A severely disproportionate penalty may well indicate whether the court objectively considered protection of the Government's prosecutorial privilege or reacted emotionally to a superficially questionable indictment. Racially selective prosecution is a challenge to the prosecution, not a defense to the crime charged. Accordingly, the Federal Death Penalty Act affords no mitigation of penalty based on selective prosecution. [14] *See generally* 18 U.S.C. § 3592. The court's "sanction" instruction would, however, place the burden on the Government to prove that it had not engaged in discriminatory selective prosecution of Williams; this would turn

on its head the *Armstrong* requirement that the *defendant* carry the high burden of proof of selective prosecution. *See Armstrong,* 517 U.S. at 465-66, 116 S.Ct. at 1486-87. In this way, the instruction would create an extra-statutory, wholly unauthorized defense of selective prosecution. *See* 18 U.S.C. § 3592(a) (1)-(8) (delineating permissible mitigating factors a defendant may raise). Judge Gilmore's jury instruction appears simultaneously to be preventing the Government from enforcing the death penalty against Williams, while prohibiting any ordinary appellate review of the court's determination. [15] This combination of legislating from the bench and acting as a quasi-defense attorney vis-à-vis the jury is unprecedented and ultra vires. [16]

Based on the Government's extraordinary showing under the first two parts of the mandamus test, we conclude that issuance of the writ, though discretionary, is appropriate under the circumstances. *Cheney*, 124 S.Ct. at 2587. While we are loath to interfere with the

manner in which a district court runs its cases, mandamus is demanded in this death penalty case where over two hundred venirepersons are poised to be impanelled, where the consequence of the court's instructional error could deprive society of a lawful punishment, and where the trial court has disregarded controlling law and in a gross abuse of discretion, prejudiced the Government's case and stymied orderly appellate review. We grant the Government's writ of mandamus and vacate both the discovery orders [17] and the sanctions.

Conclusion

On remand, we expect the case to proceed as expeditiously as possible [18] while advancing the legitimate goals of the federal judicial system and protecting the rights of both parties. The writ of mandamus is *GRANTED*, and the discovery orders and sanction are *VACATED. IT IS FURTHER ORDERED* that the stay of trial proceedings is hereby *LIFTED* and the case is *REMANDED* for *IMMEDIATE* proceedings not inconsistent with this opinion.

Notes:

[1] Before filing the Notice, the Government went through the protocol required by the Department of Justice (DOJ) before a United States Attorney may seek the death penalty in the case. This requires the U.S. Attorney to seek the opinion of the Capital Crimes Unit in Washington, D.C., and final approval from the United States Attorney General. This process began when the grand jury returned the initial indictment on June 12, 2003. Interestingly, while pursuing this procedure, the United States submitted an unopposed motion to extend the death penalty notice deadline, which Judge Gilmore denied. Judge Gilmore did not reconsider this motion and grant an extension until after the Government filed an unopposed motion to reconsider and United States Attorney Michael Shelby personally appeared before her to explain the delay.

[2] The status of the co-defendants varies. Some have pled guilty, others have apparently fled the country and have not yet been served with arrest warrants, and still others have been found guilty at trial. One co-defendant, Claudia Araceli Carrizales-Gonzales, was ordered immediately released by Judge Gilmore on the last day of trial based on the judge's ruling that the Government failed to prove one of the elements of its case. This order was entered despite the Government's vociferous objection. Another co-defendant awaits trial after being severed from the original co-

defendants upon Judge Gilmore's willingness to suppress her confession. The Government has appealed that decision. *United States v. Cardenas,* No. 04-20449. We express no opinion as to the other cases.

[3] Initially, Judge Gilmore explained that the order's language on "capital charging practices" was "inclusive of this case but not this case exclusively." Status Conference, Nov. 1, 2004, Tr. at 17. The scope of discovery grew at the November 10 status conference, as indicated above.

[4] *See, e.g.* Tr. at 18:

... my specific instructions and our discussions were that [the discovery order] applied to this case and generally; but to the extent that there was any claim of privilege or work product, that that claim could be made in response to making discovery, and that the United States could specifically say, "[T]here were other things that occurred, but we are making this privilege or that privilege claim." But no privilege claim was made and then no information was provided.

Tr. at 20:

I said, if you have something for which you think that there is a claim of a privilege, then you need to tell me what it is. You didn't bother to even say that. I mean, nowhere in here did you say, "There were other things that we considered; and we did not produce them or disclose them in discovery even though we were ordered to do so, and here's the privilege we're claiming." That's all I asked you to do. Because the way that it is now, it's sort of like a thumb your nose at the Court kind of response.

Tr. at 23:

No. Stop. I don't care about that stupid motion for reconsideration. I didn't think you should have filed it anyway. I thought that you were being, you know, obtuse when you filed that motion for reconsideration. All I care about is the discovery. To me that [deliberative] information should have been filed here ... I am not asking what [the Attorney General of the United States's] thought process were [sic] when he looked at the facts. We just want the facts. I don't care what he was thinking about.

[5] *See, e.g.,* Tr. at 17:

Y'all are just kind of piddling around, piddling around trying to make up your mind if you can just kind of get away with not giving it.... So, you have just sort of looked at my order and then said, disclose the information about why you sought the death penalty on this guy, the only black defendant, and not anybody else based on the defendant's motion, and tell me what the rationale and what the thinking was. And then you said, "Yes, I will. I understand your order." And you walked out of here and basically said, "Phff. We got problems with it; it's separation of powers. We are just not going to basically do it." That is contempt. Mr. Washington [Williams's counsel] is right.

[6] Judge Gilmore further used this opportunity to excoriate the Government for its lack of decorum, and also for its incorrect capitalization as mandated by *The Bluebook. See, e.g.,* Dec. 29, 2004, Order at 5 n. 1 ("In addition to capitalizing 'Court' when naming any court in full or when referring to the U.S. Supreme Court, practitioners should also capitalize 'Court' in a court document when referring to the court that will be receiving that document." *The Bluebook: A Uniform System of Citation* P. 6(a) at 17 (Columbia Law Review Ass'n et al. eds., 17th ed.2000)); *id.* at 11 ("Based on this conduct, the Court feels compelled to admonish the Government lawyers

that continued verbal argument after a court rules is not in keeping with the decorum expected and required in a court of law. Moreover, repeated written argument after a ruling has been made and a proper motion for reconsideration has been denied is truly a waste of judicial resources.").

[7] Specifically, the Government requests that the following discovery orders (all interrelated) be vacated: the discovery order entered October 29, 2004, requiring the United States to produce discovery evidence relating to the United States's capital charging practices; an oral order announced at the December 17, 2004, status conference, purporting to compel the United States to submit a signed letter from the United States Attorney General asserting that he will not comply with the discovery order because the requested information is privileged; and a December 29, 2004, written order detailing the sanctions the district court will impose for the United States's failure to comply with the discovery orders.

[8] Although this court had granted a stay on December 31, 2004, Judge Gilmore entered yet another order denying the Government's motion for a stay of the proceedings on January 3, 2005. In that order, she stated that any stay of the proceedings could make it "unlikely that this case could be rescheduled for trial before January 2006." Amended Order, Jan. 3, 2005.

[9] By contrast, Williams now asserts that Holloway was not similarly situated because she cooperated with the Government. This does nothing to help his claim of selective prosecution.

[10] Further, the indictment, coupled with the Government's rationale offered to Judge Gilmore after Williams raised a selective prosecution claim, offered a valid, non-discriminatory explanation for seeking the death penalty against Williams. *Cf. Webster,* 162 F.3d at 335 (finding a non-discriminatory explanation where the Government's determination to pursue the death penalty against one defendant and not others "is justified by the objective circumstances of the crime and the sufficiency and availability of evidence to prove the required elements under the law").

[11] *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 374, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886) (demonstrating that Government officials denied the applications of 200 Chinese nationals seeking to operate laundries in wooden buildings, but granted the applications of 80 non-Chinese individuals desiring to operate laundries in wooden buildings) (cited by *Armstrong,* 517 U.S. at 466, 116 S.Ct. at 1487, in explaining the extremely high, "but not impossible," standard a criminal defendant must meet to demonstrate the "similarly situated" requirement).

[12] However, Judge Gilmore later conceded, as she was required by *Armstrong,* that this type of information was not subject to the requirements of Federal Criminal Rule of Procedure 16. *See Armstrong,* 517 U.S. at 463, 116 S.Ct. at 1485 ("We hold that Rule 16(a) (1) (C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case in chief, but not to the preparation of selective-prosecution claims."); *accord* Order, Dec. 29, 2004, at 15.

[13] We state no opinion on the appropriate parameters required when and if a criminal defendant makes a showing sufficient under *Armstrong* to obtain discovery.

[14] Further, the premise of Judge Gilmore's proposed instruction is false. The proposed instruction states that the order the Government declined to follow was "lawful"; as our previous analysis has discussed, this was not the case.

[15] Although Williams is correct in asserting that "capitally charged defendants must be permitted

to present *all* relevant mitigating evidence" (Br. in Opp. to Petition at 41), the defendant is not entitled to have the district judge make such arguments for him from the bench under the guise of a "jury instruction."

[16] We will not devote much effort to Judge Gilmore's demand that the Attorney General of the United States himself sign a letter asserting privilege. This request was obviously inappropriate. *See* 28 U.S.C. § 541 (President of the United States appoints each United States Attorney); 28 U.S.C. § 547 (defining the powers of the United States Attorneys); 28 U.S.C. §§ 516-520 (vesting plenary power in the Attorney General of the United States to supervise and conduct all litigation to which the United States is a party); 28 U.S.C. §§ 542, 547 (allowing delegation of responsibilities from the Attorney General and the United States Attorney to Assistant United States Attorneys); *see also In re Office of Inspector General,* 933 F.2d 276, 278 (5th Cir. 1991) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.") (quoting *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 586 (D.C.Cir. 1985)).

[17] Judge Gilmore appeared to reconsider her demand that the Attorney General of the United States respond to her requests in writing in her December 29, 2004, Order. *See* Order, Dec. 29, 2004, at 14-15. However, because she never formally vacated that order, the writ of mandamus should be read to vacate that discovery order to the extent it still exists.

[18] This includes using the current jury pool, each member of which has obeyed his civic duty and gone through the laborious process of completing the questionnaires submitted by counsel. If trial is not commenced within thirty days, the Government may seek further mandamus relief to that end.
